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Supreme Court of the United States.

No. 10 (Original).—Oct. Term, 1879.

EX-PARTE:

THE DENVER & RIO GRANDE RAILWAY COMPANY, PETITIONER FOR MANDAMUS.

BRIEF FOR THE PETITIONER.

WAGER SWAYNE,

Of Counsel.

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Supreme Court of the United States.

THE DENVER AND RIO GRANDE RAILWAY COMPANY

vs.

THE PUEBLO AND ARKANSAS VALLEY RAILROAD COMPANY.

Argument on Petition for Mandamus.

An Act of Congress passed March 3d, 1875, grants to any lawfully organized railroad company, a right of way through the public lands of the United States.

In its second section, the act provides:

> "That any railroad company whose right of way, or whose track or road-bed upon such right of way, passes through any cañon, pass or defile, shall not prevent any other railroad company from the use and occupancy of said cañon, pass or defile, for the purposes of its road, in common with the road first located, or the crossing of other railroads at grade. * * * "

The use in common of a defile by two railroad companies involves that if each has its separate track, one or the other company shall from prior occupancy or from other reasons, have first choice of location. This first choice may, while leaving ample room for one or more additional companies to build, yet carry with it large economies in building, and in operation afterwards.

Upon a natural railway route from Leadville, Colorado, to the East, the valley of the Arkansas is for a number of miles so narrow and precipitous that on each side of the river one line of railroad and one only can be built, and the right of choice between these two involves considerations of enormous value.

This right of choice was contested in this court at the October term, 1878, between two railroad companies, spoken of in the opinion as the Denver Company and the Cañon City Company. It was decided that the right of choice lay with the Denver Company.

> "It results from what we have said, that the court below erred in enjoining the Denver Company from proceeding with the construction of its road in the Grand Cañon. The decree, as entered, can only be sustained upon the assumption that the Cañon City Company had by a prior occupancy acquired a right superior to any which the Denver and Rio Grande Railway Company had to use the Cañon for the purpose of constructing its road. But that assumption, we have seen, is not sustained by the evidence, and is inconsistent with the rights given by the Acts of Congress to the Denver Company. The Denver Company should have been allowed to proceed with the construction with its road unobstructed by the other company. Where the Grand Cañon is broad enough to enable both companies to proceed without interference with each other in the construction of their respective roads, they should be allowed to do so. But in the narrow portions of the defile where this course is impracticable, the court, by proper orders, should recognize the prior right of the Denver and Rio Grande Railway Company to construct its road."
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> Further, if in any portion of the Grand Cañon it is impracticable or impossible to lay down more than one road-bed and track, the court, while recognizing the prior right of the Denver Company to construct and operate that track for its own business, should, by proper orders and upon such terms as may be just and equitable, establish and secure the right of the Cañon City Company conferred by the Act of March 3d, 1875, to use the same road-bed and track, after completion, in common with the Denver Company.
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> The decrees in these causes are therefore reversed, with directions to set aside the order granting an injunction against the Denver and Rio Grande Railway Company, and also the order dissolving the injunction granted in its favor, and dismissing its bill. By proper orders, entered in each case, the court below will recognise the prior right of that company to occupy and use the Grand Canon for the purpose of constructing its road therein, and will enjoin the Cañon City and San Juan Railway Company, its officers, agents, servants and employees from interfering or obstructing that company

in such occupancy, use and construction. It may be that during the pendency of these causes in the court below or in the rendition of the decree appealed from, the Cañon City & San Juan Railway Company has, under the authority of the circuit court, constructed its roadbed and track in the Grand Cañon, or in some portion thereof. In that event, the cost thus incurred in those portions of the canon which admit of only one roadbed and track for railroad purposes, may be ascertained and provided for in such manner and upon such terms and conditions as the equities of the parties may require."

The most urgent, if not the most important, matter here decided, was the right adjudged to be in the original plaintiff to immediate possession. Pending the controversy, the wealth of ore discovered in regions to which the readiest route lay through this canon suddenly offered, as it still presents, an opportunity for carriage of both goods and persons, yielding each day the ordinary revenue of weeks from like investments. The public need of such facilities, of course, was on a scale proportionate. So tempting indeed became and is the opportunity for gain, and such the difference in the value of the two locations which are possible, that even after the appeal which has resulted favorably to the Denver Company, the Canon City Company constructed an entire road on the disputed route. It even did most of the work after the judgment of this court against its right to that location, counting apparently upon its chances to retain possession through some supplemental bills. By means of these it actually has detained the plaintiff from possession to this hour. Through them it is now seeking to delay the execution of the mandate, so far as possession is concerned, pending the hearing which has been had upon those supplemental bills and cross appeals therefrom.

The Denver Company, of course, has waited with proportionate impatience for possession of its own, consoling itself possibly with advice that what the opposing party was building on its ground would, if this court decided in its favor, save it that much expense and time, and would in so far compensate delay.

The right to this possession is the motive of the present application to this court.

The mandate of this court, having issued in due form, on the foregoing decree, the Denver Company applied to the Circuit Court to execute the mandate by a suitable decree, and give immediate possession. The Circuit Court refused, first making an interlocutory order, upon which is grounded the present application, and afterwards making the facts referred to in the order the basis of a decree, which is now before the court as an amendment to the return. The order was as follows :

> Now, on this day, it is ordered that the said decree heretofore given and allowed in this cause be vacated and set aside, and the said defendant shall recover of and from the said plaintiff its costs to the date of filing the said mandate to be taxed.
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> And the right of the said defendant to first locate and construct its railway upon the way mentioned and described in the bill of complaint herein, as as against the said Canon City & San Juan Railway Company, and the Pueblo & Arkansas Valley Railroad Company, and as of the date of the commencement of this suit, and the date of the said decree, is recognized and established.
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> Forasmuch, however, as it is alleged by the said plaintiff, in certain supplemental bills, by it filed herein, that since the said decree the said defendant hath granted, sold, or otherwise yielded to the said plaintiff its right of way in the premises, and forasmuch as it is also alleged by the said plaintiff, that since the said decree the said plaintiff hath built wholly or in part upon the said way, and upon the line heretofore located by the said defendant, a railway of such gauge and structure as the said defendant hath proposedt or build, for which, as the whole or some part thereof, the said defendant ought in equity and good conscience to pay the reasonable value, and because the value of the said railway is at present unknown to the court, no further decree touching the ultimate right of the parties can be given or allowed until the court shall be better advised in the matters aforesaid.
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> And it is considered by the court that the relations of the parties of and concerning the line of railway heretofore constructed or now in process of construction, as aforesaid, ought not to suffer any change pending such inquiry touching the facts upon which the further and final judgment and decree of the court will be given ; therefore, let each of the parties be enjoined and restrained from doing any act or thing toward building and completing the said line of railway, until the further order of the court. Nor shall either of the said parties interfere with the present possession of the other in the said line of railway, but each shall remain in the possession of that part which it now holds, until the further order of the court. And of this order the parties shall take notice, without writ or further service. But if either of the said parties shall desire to construct another line of railway on the

same right of way, without interfering with the grade or road bed constructed by the said plaintiff, or the Canon City and San Juan Railway Company, it shall be at liberty to do so.

To advise the court of and concerning the cost and value of the railway, constructed wholly or in part by the said plaintiff, and of the several matters hereinafter mentioned, three engineers will be appointed, of whom each of the parties may nominate one, who shall report to the court the matters following:

1. In constructing two roads from Canon City to the twentiethy-mile post to what extent must they occupy the same track?

2. Whether the Grand Canon of the Arkansas river is broad enough to enable both companies to proceed without interference with each other in the constuction of their respective roads; or if one be already constructed, then whether such constructed line will interfere with or render impracticable the construction of a second line? Whether in the narrow portions of said Canon there is any place where this course is impracticable? And, if so, whether any road bed or railroad has been constructed in such place or places—and the cost and reasonable value of the same.

3. If two roads shall be built on the Arkansas river, from Canon City to the twentieth-mile post, to what extent shall they be located on opposite sides of the river, and the cost thereof relatively to each other?

4. What has been done by the Canon City & San Juan Railway Company, or the Pueblo & Arkansas Valley Railway Company towards constructing a railroad from Canon City west to the twentieth-mile post?

5. What is the location of the line so constructed, or partly constructed, with reference to the Arkansas river and the defiles and canons thereof?

6. What part of such line is below the Grand Canon of the Arkansas river? As to that part, is there space for another line on the same side of the river to be constructed at about the same cost as that which has been built?

7. What is the value of the line from Canon City to the 20th mile post, as a whole, and in sections and subdivisions?

8. What part of the line, so constructed, is on the public domain, and what part of it on lands owned by individuals or corporations?

9. What is the value of those parts that are on the public domain, and of those parts that are on lands owned by individuals or corporations, stating the value of each such part separately, so far as they may be continuous?

In determining the matters aforesaid, the said Commissioners shall examine the line, and they may hear any evidence that has been taken in any of the causes pending in this court between the parties to this controversy. But such evidence shall not be embodied in their report, nor shall it be necessary to refer to the same. The said Commissioners shall also hear such testimony relating to the cost of constructing the road as may be given before the examiner, not exceeding five witnesses on each side. And upon such evidence, with their own judgment, from examination of the work, they shall determine its value. They shall also hear such evidence touching the ownership of the lands traversed by the line as to whether the same are owned by the General Government or by individuals, as may be taken before an examiner, not to exceed five witnesses on a side. On this issue, the plaintiff shall furnish to

the Commissioners and the defendant a list of the lands traversed by the line, stating in each instance with convenient certainty, and so far as may be known to the plaintiff, the ownership of the lands. No survey by or under the authority of the said Commissioners shall be be made without authority from the court, but each of the parties to this suit shall furnish to the said Commissioners the notes of surveys by them respectively made, with proper plats and profiles of the same lines. The parties shall proceed to take the testimony hereinmentioned, touching the cost of the line and the ownership of the land traversed by the line without unnecessary delay, and they shall lay the same before the said Commissioners whenever the latter may be prepared to consider it. Such evidence shall not be embodied iu the report of the Commissioners, nor shall it be necessary to refer to the same in such report. It may be returned into court without other authentication than the certificate of the examiner. The Commissioners shall be sworn faithfully to discharge the duties enjoined by this order, and their report shall be returned under oath ten days at least before the next term of this court, and either party shall be at liberty to except to the same. The Commissioners nominated by the parties shall be paid by them respectively, and he who is nominated by the court will be allowed a compensation to be hereafter fixed, and to be contributed by the parties in equal parts, and finally taxed as the justice of the case may require. To meet the current expenses of the Commissioner, each of the parties within three days from this date shall deposit in the First National Bank of Denver, to the credit of the clerk, the sum of two hundred and fifty dollars ($250), to be by the clerk paid to the said Commissioner when he shall have been appointed, and shall have entered on his duties.

The engineers of each party may, without hindrance from the other, enter on the line and right of way in controversy in this suit for the purpose of verifying their maps and plats of surveys heretofore made by them respectively, but they shall not restake any such line, nor shall they remove any stake or stakes from any such line. Either party shall be at liberty to survey a new line on the opposite side of the river from that which has been constructed, or partly constructed, at points wholly distinct from such constructed line.

Either party shall be at liberty to apply for further order in the premises, as they may be advised.

This order amounts to a peremptory refusal to admit the Denver Company to possession pending the report of the investigation it directs and pending final hearing on the supplemental bills.

This is the substance of the first return. Under this order the possession was detained from the Denver Company from its date, the 21st of April, 1879, to the 2d of January, 1880, during which time all the plans of the company were in par-

alysis, and a whole year of the utmost business value irrecoverably lost. Upon the date last mentioned, the report having come in and the hearing being ended, the court entered the following decree, which is now before this court as an amendment to the return :

"These causes coming on now for final decision upon the final submission heretofore made, and having been heard and submitted together, and the court being sufficiently advised in the premises, doth order, adjudge, and decree as hereinafter stated, this decree shall be entered in the first of the above entitled causes, and comprehending all matters in issue in any of said causes, shall stand as and for a final decree in each and all in so far as the several matters herein adjudged and decreed shall be found to be in issue in any or in all of the said causes. The first supplemental bill, filed May 24, 1879, by the Pueblo and Arkansas Valley Railroad Company, shall be, and the same is hereby dismissed at the costs of the complainant herein, said costs to include all costs in support and defense of said bill to be taxed.

NOTE.—Some parts of this decree require reference to the fact that other suits, in the same court and between the same parties, and involving other portions of the right of way, seized by the Cañon City Company and its successors, were heard and decided at the same time with the supplemental bills which have been suffered to obstruct the mandate which it is now sought to have enforced.

the Pueblo and Arkansas Valley Company, between the points above named, if it shall elect to take and make payment for the same as hereinafter provided, and the decree of this court of August 24, 1878, as set out in the mandate of the Supreme Court, is hereby set aside and held for naught, and, in accordance with the direction of the mandate of the Supreme Court, it is ordered, adjudged and decreed that the Denver and Rio Grande Railway Company has the prior right to occupy and use the Grand Canon of the Arkansas River, in the pleadings in these causes mentioned, for the purpose of constructing its railroad therein (and when the said Denver and Rio Gaande Railway shall have made payment t the satisfaction of the Pueblo and Arkansas Valley Company, or of this court for the above mentioned constructed and partly constructed road, then and thereupon all injunction and restraining orders heretofore made in either of these causes against the Denver and Rio Grande Railway Company shall be dissolved and set aside and the Pueblo and Arkansas Valley Company, its officers, agents and servants shall thereupon and thenceforward be perpetually enjoined from interfering with or in anywise obstructing the Denver and Rio Grande Railway Company in the location, construction and use of its railroad upon the line aforesaid.

Third.—That as to that part of the line from the mouth of the South Arkansas river to Leadville, in the pleadings herein, the court does find, order, adjudge, and decree that the prior right of way upon said line is in the

alysis, and a whole year of the utmost business value irrecoverably lost. Upon the date last mentioned, the report having come in and the hearing being ended, the court entered the following decree, which is now before this court as an amendment to the return :

"These causes coming on now for final decision upon the final submission heretofore made, and having been heard and submitted together, and the court being sufficiently advised in the premises, doth order, adjudge, and decree as hereinafter stated, this decree shall be entered in the first of the above entitled causes, and comprehending all matters in issue in any of said causes, shall stand as and for a final decree in each and all in so far as the several matters herein adjudged and decreed shall be found to be in issue in any or in all of the said causes. The first supplemental bill, filed May 24, 1879, by the Pueblo and Arkansas Valley Railroad Company, shall be, and the same is hereby dismissed at the costs of the complainant herein, said costs to include all costs in support and defense of said bill to be taxed.

First.—That from the mouth of the Grand Canon to the mouth of the South Arkansas River, the Denver and Rio Grande Railway Company has the prior right of way to select the route for and locate and construct its road; and that by its entry into the Grand Canon and occupation thereof in the month of April, 1878, it had secured the right to locate its line in the said canon, and hence westward to the mouth of the South Arkansas River.

Second.—That the Denver and Rio Grande Railway Company is entitled to the road constructed, and partly constructed by and now in possession of the Pueblo and Arkansas Valley Company, between the points above named, if it shall elect to take and make payment for the same as hereinafter provided, and the decree of this court of August 24, 1878, as set out in the mandate of the Supreme Court, is hereby set aside and held for naught, and, in accordance with the direction of the mandate of the Supreme Court, it is ordered, adjudged and decreed that the Denver and Rio Grande Railway Company has the prior right to occupy and use the Grand Canon of the Arkansas River, in the pleadings in these causes mentioned, for the purpose of constructing its railroad therein (and when the said Denver and Rio Gaande Railway shall have made payment t the satisfaction of the Pueblo and Arkansas Valley Company, or of this court for the above mentioned constructed and partly constructed road, then and thereupon all injunction and restraining orders heretofore made in either of these causes against the Denver and Rio Grande Railway Company shall be dissolved and set aside and the Pueblo and Arkansas Valley Company, its officers, agents and servants shall thereupon and thenceforward be perpetually enjoined from interfering with or in anywise obstructing the Denver and Rio Grande Railway Company in the location, construction and use of its railroad upon the line aforesaid.

Third.—That as to that part of the line from the mouth of the South Arkansas river to Leadville, in the pleadings herein, the court does find, order, adjudge, and decree that the prior right of way upon said line is in the

Peublo and Arkansas Valley Railroad Company, by reason of its having first located its line on that part of the route, which right of way is hereby confirmed to said Peublo and Arkansas Valley Railroad Company.

Fourth.—It is further ordered, adjudged, and decreed, that either of said companies may elect to build another railroad distinct from that already built or partly built between the points aforesaid.

Fifth.—That Andrew N. Rogers, Esq., of Central City, in this State, be and he is hereby appointed a Commissioner of this court for the following purposes, viz.:

1st. To ascertain and fix the points at the mouth of the Grand Canon and at or near the mouth of the South Arkansas river, where the road already built or partly built may be connected with another line.

2d. To compute the cost of the road already built or partly built between the points last mentioned.

In making such computation of the items designated as "legal" and "miscellaneous" mentioned in the report of the Commissioner, such part only shall be taken as forms a part of the cost of the right of way. If the testimony in the records shall not be sufficient to advise the Commissioner as to the cost of said road, further testimony shall be taken in that behalf as he may direct. If said Commissioner shall desire to take further testimony, he will report the fact of the cost, and thereupon an examiner will be appointed for the purpose of taking the same, and the said examiner, when appointed, shall be and is hereby empowered and authorized to administer oaths to witnesses testifying before him, and in all his actings and doings herein he shall be governed by and conform to the rules and practice of this court, relating to Masters in Chancery, so far as applicable. The said Commissioner shall, upon request of either party, report the cost incurred in the construction of said railroads in sections or divisions as by the said parties, or either of them, may be required, and one division thereof may be of what is known as the Royal Gorge; and he shall also report, upon their request, the time or times when the outlay or cost was incurred; the points hereinbefore mentioned to be fixed by said Commissioner shall be at such places as will enable the road in question to be connected with facility with extensions to or from said points with economy and security in operating the same as a continuous line. Said commissioner shall make his report to this court as soon as practicable.

In case either party shall elect to build a new or second line of road between the points above named, that is, between the mouth of the Grand Canon and the mouth of the Arkansas river, between the mouth of the South Arkansas river and Leadville, the said Commissioners shall supervise and control such construction at all points where the two lines come so nearly together as to lead to conflict or dispute between the two companies, and he shall have power at all such points to control the location, construction, and operation of both lines.

Before entering upon the discharge of his duties, the said Commissioner shall be sworn—faithfully sworn—to perform the same, and he shall receive such compensation as the court may hereafter allow.

Sixth.—That upon the filing of the report by the Commissioners, the clerk the court shall notify the parties respectively of the fact of such filing, and

within ten days from the filing of such report, the Denver and Rio Grande Railway Company shall elect whether or nor the completed or partially completed road of the Pueblo and Arkansas Valley Railroad Company between the mouth of the Grand Canon and the mouth of South Arkansas river, and make payment therefor. Such election to be in writing, and filed with the clerk of this court.

Seventh.—In case the Denver and Rio Grande Railway Company shall elect to take such constructed and partly constructed road, it shall, within sixty days from the date of the filing of the Commissioners' report, deposit in the Chemical National Bank, of the City of New York, to the credit of the clerk of this court, the sum specified in such report, and thereupon the constructed and partly constructed road between the points aforesaid shall be delivered over to the said Denver and Rio Grande Railway Company, and upon the approval of the said Commissioners' report the sum named therein shall be paid to the said Pueblo and Arkansas Valley Railroad Company.

Eighth.—That the right of the Denver and Rio Grande Railroad Company to enter upon the right of way of the Pueblo and Arkansas Valley Railroad Company between the mouth of the South Arkansas and Leadville, and to build another line of road between these points in such manner as not unnecessarily to interfere with the convenient and useful operation of the Pueblo and Arkansas Valley Railroad Company's road, and under the conditions hereinbefore set forth, is hereby recognized and affirmed.

Ninth.—In case either party hereto shall determine to construct a second line or lines of road as hereinbefore provided, it shall, within thirty days from the date hereof, file a written notice to that effect with the clerk of this court.

Tenth.—The filing of the election by the said Denver and Rio Grande Railroad Company to take the constructed and party constructed road, and the payment of the money for the same, shall not preclude the Denver and Rio Grande Company from excepting to the report of the Commissioners as to the value of said road, but the same may be excepted to as if such act had not been done; and the Pueblo and Arkansas Valley Railroad Company shal have the same right to except to such report, notwithstanding the acceptance of the purchase money.

Eleventh.—The costs of this suit, excepting as hereinafter provided, shall be be divided and paid equally by the parties hereto; and in default of payment, execution shall issue therefor.

Twelfth.—If another line shall be built in or through the Grand Canon, it shall be according to the second plan proposed by the Commissioners in the report on file in this case as a second track parallel and adjacent to the present road.

Thirteenth.—In the event of the building of a second line through the said Grand Canon, the court will hereafter determine whether a change of ownership in respect to the lines in that is not required for the convenient operation of each. In that event the difference in cost will be adjusted as may be necessary to secure the rights of each.

(Signed) MOSES HALLETT.

The present net result of this order and decree, now that an nvaluable year has been already lost, are that the Denver Company may have possessior of the location in dispute, and of the railroad which since the suit began the Canon City Company has constructed upon the location in dispute; but subject to the following conditions:

> "The Denver and Rio Grande Company is entitled to the road constructed, and partly constructed by, and now in the possession of the Pueblo and Arkansas Valley Company, between the points above named, if it shall elect to take and make payment for the same, as hereinafter provided. * * * And when the said Denver and Rio Grande Railway Company shall have made payment to the satisfaction of the Pueblo and Arkansas Valley Company, or of this court, for the above mentioned constructed and partly constructed road, then and thereupon all injunction and restraining orders heretofore made in either of these causes against the Denver and Rio Grande Railway Company shall be dissolved and set aside.
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> Andrew N. Rogers, Esq., of Central City, in this State, is hereby appointed a Commissioner * * to compute the cost of the road already built or partly built between the points last mentioned.
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> Upon the filing of the report by the Commissioners, the clerk of the court shall notify the parties respectively of the fact of such filing, and within ten days from the filing of such report the Denver and Rio Grande Railway Company shall elect whether or not it will take the completed or partially completed road between the mouth of the Grand Canon and the mouth of the South Arkansas river, and make payment therefor. Such election to be in writing, and filed with the clerk of this court.
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> The filing of such election by the Denver and Rio Grande Railway Company, to take the constructed or partly constructed road, and the payment of the money for the same, shall not preclude the Denver and Rio Grande Company from excepting to the report of the Commissioner as to the value of said road, as if sueh act had not been done; and the Pueblo and Arkansas Valley Railroad Company shall have the same right to except to said report, notwithstanding the acceptance of the purchase money."

These are really:

First.—A decree in favor of the Canon City Company, or its successors, and against the Denver Company, for the cost or value of a railroad which the former company has constructed upon ground belonging to the latter.

Second.—An injunction against the Denver Company forbidding the use of its own ground until the amount of the decree is

fixed by a new reference, and afterwards till that amount is paid.

That the payment of such an amount is in no sense contemplated by the decree and mandate of this court, is plain. That decree was –

> *First:* The decrees in these causes are therefore dissolved, with directions to set aside the order granting an injunction against the Denver & Rio Grande Railway Company; and also the order dissolving the injunction granted in its favor, and dismissing its bill.
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> *Second:* It may be that, during the pendency of the causes in the court below, or since the rendition of the decree appealed from, the Canon City & San Juan Railway Company has, *under the authority of the Circuit Court,* constructed its road-bed and track in the Grand Canon, or in some portion thereof. *In that event the cost* thus incurred *in those portions* of the canon, *which admit of only one road-bed* and track for railroad purposes may be ascertained and provided for in such manner, and upon such terms and conditions as the equities of the parties may require.

The decree of this court is that the Circuit Court may, "by proper order, provide for" the cost incurred by the Canon City Company "in those portions of the canon which admit of "only one road-bed and track for railroad purposes."

The ground of this order is equally plain and substantial. The use "in common" of a defile, which the act permits, must rationally mean that wherever the topography is such as to admit reasonably of separate road-beds, the several companies shall have the common privilege of constructing each its separate road-bed through the pass. More than this would be to mean that wherever the situation could be considered as a "canon, pass, or defile," there any company may seize another's track and road-bed, and insist upon using it in common with the owner. Wherever, therefore, the character of the defile is such as to admit of more than "one road-bed or track," for one company to build on the location of another is mere trespass.

Where, on the other hand, the character of the defile is such as to admit of but one road-bed and track, there "prior right"

has quite a shadowy meaning, and there, irrespective of the outcome of a controversy such as this, a single road-bed must at last be used in common by the two or more contestants, and individual and public interest alike require and permit that either may build at common cost what must in any case be for the common use. This is, we take it, what this court did mean; not that a trespasser should be *entirely* reimbursed, but that wherever a portion of what the Canon City Company had constructed *must* be used in common, the cost should be *divided* in appropriate proportions.

From the decree just rendered by the Circuit Court, however, it appears that by the very judgment of that court no part of what has been constructed by the Canon City Company is within what this court has defined as rightly to be paid for. The decree itself not only recognizes that it is entirely feasible to build a second track entirely through the canon, but also designates the route on which it should be built, to wit: that one of several plans reported by the court's commission which is enumerated as the "Second Plan."*

"*Second.*—The second road can be built, as in plan first, from Canon City to Station 185 of the constructed line; a second track can be built on the same right of way and adjoining the road already built, from the entrance to the Grand Canon at Station 185 ($3\frac{52}{100}$ miles) to Station 557x50, (about 7 miles), at a cost not exceeding that of the constructed line, this track being at all points at a sufficient distance from that of the constructed road, to prevent any interference with the operation of the two roads when completed; providing, that the constructed road can be so controlled as to facilitate the building of the second track, and permit such slight changes in the alignment of the constructed road as the correct and economical construction of the second track may require. At Station 557x50, the second road would cross the Arkansas river to the south side, and continue on the south side to a point opposite

* See ante, page 9, clause Twelve of the

the 20th mile post; or the double tracking may be continued to station 591 at the head of the Grand Canon."

It follows therefore that the entire subject-matter of the payment ordered by the Circuit Court is outside of what this court pronounced to be the limit of proper compensation. The value of the property so ordered to be paid for is probably a little over half a million.

The Denver Company here suggests its right to an appeal against this judgment, and to stay the operation of the judgment pending such appeal; the danger to it that if its appeal should be sustained, so large a sum paid out without security will still be found to have been irrecoverably paid; *and above all its right to counter-claim and set-off against this sum so much of the incalculable damage it has suffered from the original injunction, as a court may lawfully condsider.* It objects to the frame of the decree, which, while permitting exceptions to the amount found by the Master as the cost, precludes exceptions to the principles of that report, and *artfully requires the Denver Company to elect to pay before it gets possession.* To all this the counsel for the Canon City Company answer, Appeal, appeal—that is the remedy for an unlawful judgment; but pending the appeal endure destructive dispossession.

Against remission to such ineffectual appeal the Denver Company appeals by this proceeding.

The decree of this court was a plain finding that originally the Denver Company had title and possession, that its title was good, and its possession ought to be restored, with due regard to certain rights which this court specified.

The Circuit Court, whose judgments are appealable and may be superseded, having rendered a decree in favor of a larger right than that admitted by this court, avoids, in be-

half of that decree both the above methods of impeachment, by refusing to the Denver Company that original possession, which this court directed it should have, and without which its ownership is worthless. Original possession means that resort must be had to an original proceeding to divest it; and in such a proceeding a decree would be appealable—hence this resort to supplemental bills. The direction of this court was to restore to the Denver Company its original possession, with certain specified conditions. The Circuit Court has so enlarged those conditions as to nullify the mandate. Whatever had this effect was either restoration of a ruling already overruled, or else an original suggestion, and beyond the scope of supplemental bills. That it was also beyond those rules which prescribe the respect due to a mandate, and beyond all rules for the construction of such orders, requires no demonstration.

It was certainly the duty of the Circuit Court to give effect to the decree and mandate of this court, in all its parts, so far as could be without hazard to one part from another. The purpose and direction of this court were to restore the Denver Company to its possession, incidentally securing to the Canon City Company part payment for such portion of the road constructed by it as both companies should use in common. It was within the course and power of chancery, in restoring to the Denver Company its possession, to reserve a LIEN upon the title to the whole for full assurance to the Canon City Company that its rights in this regard would be enforced when ascertained. Only when such a lien was insufficient, and POSSESSION would add to the lien a value required to make it adequate, could there be lawful power in the Circuit Court to keep back the possession from the party to whom it was adjudged. In this case

there was then, as there is now, neither pretense nor possibility that upon any view whatever of the Canon City Company's right to compensation, such a lien, without possession, would rest on insufficient value. The Denver Company, moreover, was then as now, continually offering to give bond in any sum required. Refusing this, a public work was stopped by an injunction, against a rule of law that public works shall never be enjoined, except upon direct necessity and before unmistakable right. So serious an injunction was allowed, without sufficient cause, in conflict with the settled policy of courts of the United States against the granting of injunctions. All of this was in diminution of the mandate rather than in execution of it; all of this continues, and requires the interposition of this court.

> "In all cases this is a high exercise of power, and should be very cautiously exercised; but in a case where large and expensive works are sought to be stopped, not on account of direct or willful encroachments, but for something incident to a lawful employment, it should be made clearly to appear that it is a case for equitable intervention; that there is no adequate remedy at law, and that if not enjoined, irreparable injury or mischief will ensue to the party complainant. It is an appeal, say the books, to the extraordinary power of the court, and the plaintiff is always bound to make out a case, showing a clear necessity for it—a necessity in the light of inability to be compensated for the wrong which would ensue if not exercised. The affidavit read by the plaintiffs on the motion, did not show, we think, such a condition of things as left the chancellor scarcely an option, in view of the clear justice of the plaintiffs' case, but to restrain the defendants. They were very far short of this."—(*New Boston Coal and Mining Co. vs. Pottsville Water Co.*, 54 *Penn. St.*, 171.)

> "The act of Congress above referred to, which provides that suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate, and complete remedy can be had at law, and the further provision (*Act of March 2d*, 1793, §5, 1 *U. S. Stat. at Large*, 334, 335,) that writs of injunction shall not be granted in any case without reasonable previous notice to the adverse party, or his attorney, of the time and place of moving for the same, sufficiently indicate the spirit and policy of the legislation of

Congress on the subject of suits in equity and of injunctions. To encourage either, in preference to the ordinary common-law remedies, has not been the policy or purpose of the national legislature, and, therefore, ought not to be the policy or purpose of the courts of the United States."—(*Silliman vs. Hudson Riv. Bridge Co. at Albany*, 4 *Blatchford*, 399.)

Since the above was in type, the writer has seen the argument of Messrs. Bartlett and Shattuck. The briefs of those distinguished gentlemen do not admit further abbreviation without material omission; yet it is believed the suggestions of their brief in this case are presented with at least sufficient accuracy for all purposes of indication in the following statement of their preamble and propositions:

The preamble recites that the decree of this court ordered the injunction of the Circuit Court against the Denver Company to be dissolved, and the order of the Circuit Court dissolving the injunction in favor of the Denver Company to be revoked; but calls attention to the fact that this court did not, in either case, direct the bill to be dismissed.

This statement would have been, perhaps, more accurate if it had been reversed in order, and had stated that this court did not in either case in terms direct the bill to be dismissed, but did direct the order of the Circuit Court dissolving the injunction which had been allowed in favor of the Denver Company, to be revoked; and did direct that the injunction which had been allowed against the Denver Company be dissolved; and called attention to the fact, that the Circuit Court did not dissolve but did, in terms, continue and renew that injunction against the Denver Company which it had been in terms directed to dissolve; which action is the very ground of this complaint.

My understanding of the further suggestions of the brief, which has not in itself a summary, is given in the follow-

ing propositions, corresponding to the Roman numerals in the brief itself:

I. Even where the mandate prescribes the exact form of the decree to be entered below, (and much more where it does not,) if the decree and mandate nevertheless recognize the possible existence of acts, negotiations, or compromises between the parties, occurring pending the appeal, and declare that equities arising therefrom "can be asserted by appropriate proceedings," there the court below can amend the decree which is prescribed, to conform with its own judgment on the equities referred to.

In reply. Two matters, which in the case at bar are entirely distinct, are mingled in this suppositious case.

There are two supplemental bills. The first sets up "acts, negotiations between the parties," which, if that construction of them which in the bill is urged were true, would amount to a new and distinct title, being derived by purchase from the Denver Company, whereas the sole contention of the original bills is for a title said to be derived from the United States.

The second supplemental bill sets up some equities alleged to have arisen from some construction by the Canon City Company upon that location to which the Denver Company was adjudged to have the title. It is these equities, these only, which in the decree and order of this court are spoken of as the contingent subject of an order by the Circuit Court for their protection. The Circuit Court has by its last decree (which probably had not arrived here when the brief was made) dismissed entirely the first supplemental bill, and with it all of the acts, negotiations, or compromises set up in it are gone for the present from the case.

II. A further proposition of the brief is that after the cause is at issue, after the hearing and decree, at any time before the expiration of the term at which the decree is enrolled, either plaintiff or defendant may, by a supplemental bill, in the nature of a bill of review, plead facts material to the judgment, which have recently occurred.

To arrest the original decree in behalf of such a bill, when the bill itself is fully met by answer, and the original decree embodied in the mandate of a superior court, and, in a case of grave public and private import, to support such a bill by an injunction, in advance of any hearing, is to depart from a question of the scope and opportunity for supplemental bills.

With this remark the proposition last above referred to will be passed untill its pertinency shall be hereafter discussed.

After a hearing on the bill, and a decree in its favor, to make such an order with reference to the mandate, in behalf of the decree, that the decree itself shall operate, in despite of an appeal and supersedeas, is but a new and deliberate departure.

III. A further proposition of the brief has reference to that paragraph in the opinion of this court which states that "if, since these decrees were entered, the (successors of 'the Canon City Company) have, by valid contract, ob-'tained a controlling interest in the property, rights, and 'affairs of the Denver and Rio Grande Railroad Company, 'that interest can be asserted by appropriate proceedings, 'and will not be affected by anything we may determine in 'the course of these proceedings."

Inasmuch as the Circuit Court has, upon full hearing, rendered its decree dismissing the first supplemental bill, in

which the allegations here referred to were set up, no further comment on this head is required.

IV. The same remark applies to the next proposition of the brief, that this court may not, on an application for mandamus, scorn auxiliary process founded properly on allegations such as the above.

V. 1. The first head of the next proposition of the brief is subject to the same elimination, having reference to the averments of the first supplemental bill, which the Circuit Court has dismissed.

2. The next head of the proposition is that the supplemental bills have all the elements of cross-bills, and, therefore, have been rightly entertained.

In reply it is submitted that a bill cannot, by combining the elements of a cross-bill with those of a supplemental bill, be so framed as to have rights which neither would separately enjoy. If the bills are presented as cross-bills, they must be considered as cross-bills, nothing more. If in this light, they were not filed in due season as cross-bills, the court below could not in this light properly consider them at all. That bill now under consideration, "the second supplemental bill," the only one which has not been dismissed, was filed June 26, 1879, two months after the decision of this court had been pronounced, and six weeks after mandate issued. This bill is well styled in the bill now under review "A supplemental bill in the nature of a bill of review," and it is perhaps well to suggest that the findings and decree then under review were those of this court, not of the court below, and were not even by this court reviewable.

VI. The next proposition of the brief is that, aside from the propositions heretofore suggested, the extent and the char-

acter of any mandamus, if any is to be issued, cannot properly be such as are sought by the petition.

The petition is for a decree "that your petitioner hath the prior right to occupy and use the Grand Canon of the Arkansas River, in its cross-bill in that cause mentioned, for the purpose of constructing its railroad therein."

The qualification of this, which the brief insists on, is that this court, in directing that, by proper order entered in each case, "the court below will recognize the prior right of that company (the Denver Company), to occupy and use the Grand Canon for the purpose of constructing its road therein," did not intend the phrase used, "Grand Canon," but, in the language of the brief, "that the court had in view merely a conflict between the parties as to the occupation of the Royal Gorge." The Royal Gorge is the narrowest part of the Grand Canon, about 6,000 feet, while the whole length of the canon is about seventeen miles.

It is believed that this suggestion is nowhere to be found in the record of proceedings until after the decree and mandate of this court. The second supplemental bill, filed after the adverse decision of this court was known, attempts to narrow down its consequence to that extent, but only then in a subjunctive way. A glance at the original bills and the first supplemental bill will show, it is believed, both parties uniformly referring to and dealing with the Grand Canon in its true character of a geographical unit.

This, indeed, is pertinent, but not conclusive. If the Grand Canon were not in fact a geographical unit, so that a "prior right" to any part extends that definition to the whole, the Denver Company's "prior right," by definition of this court, would still extend throughout its limits; and in fact and law, beyond.

The prior right in question rises from the act of 1872. A lien was thereby given to the Denver Company upon the public lands for right of way on the routes named, and of the width prescribed, with power to the company to select the precise lines. The only qualification of the law of lien here to be drawn in controversy must come from want of notice. A lawful lien requires but *notice* to perfect it. To whatever extent the Canon City Company had *notice of selection by the Denver Company of a precise line*, to that extent, at least, the Canon City Company was bound by that selection to respect the prior right arising from the act of 1872.

This is the most restricted view which can be taken of that judgment of this court, which was intended, as it states, to govern all such cases:

> "It is true that the route of the road, in this case as in those cases, to aid in the construction of which the act was passed, was to be afterwards designated; and until designated the title could not attach in any specific tracts. The grant was of sections to be afterwards located, and their location depended upon the route to be established; when that was settled the location became certain, and the title that was previously imperfect acquired precision and attached to the lands.
>
> "It is always to be borne in mind, in construing a congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress. That intent should not be defeated by applying to the grant the rules of the common law, which are properly applicable only to transfers between private parties. To the validity of such transfers it may be admitted that there must exist a present power of identification of the land; and that where no such power exists, instruments, with words of present grant, are operative, if at all, only as contracts to convey. But the rules of the common law must yield in this, as in all other cases, to the legislative will."
>
> "As to the intent of Congress in the grant to the plaintiff, there can be no reasonable doubt. It was to aid in the construction of the road by a gift of lands along its route, without reservation of rights, except such as were specifically mentioned, the location of the route being left, within certain general limits, to the action of plaintiff.

When the location was made and the sections granted ascertained, the title of the plaintiff took effect by relation as of the date of the act, except as to the reservations mentioned; the act having the same operation upon the sections as if they had been specifically described in it."

"The construction thus given to the grant in this case is, of course, applicable to all similar congressional grants, and there is a vast number of them, and it will tend, we think, to prevent controversies between the grantees and those claiming under them respecting the title to the lands covered by their several grants, and put an end to struggles to encroach upon the rights of others by securing an earlier location. Our judgment is that the title of the plaintiff, attaching to the lands in controversy by a location of the route of the road, being followed by a construction of the road, took effect by relation as of the date of the act of 1862, so as to cut off all intervening claimants except in the cases where reservations were specially made in that act and the amendatory act of 1864. Such reservations operate as limitations upon the grant."—(*M. K. & T. Ry. Co. vs Kan. Pac. Ry. Co., VII. Otto*, 496-497.)

To what extent, then, had the Canon City Company, when it attempted seizure of the Grand Canon, *notice* that the Denver Company was already there by prior right?

A few extracts from the opinion of this court, pronounced in the original case, are a sufficient demonstration of the fact and of the finding that both the location and attaching right, though not perfected by the surveys made in 1871-2, yet, when they were perfected, became co-extensive with those surveys, which extended both ways through the canon and beyond.

"In January and February, 1871, very shortly after its articles of incorporation were filed in the proper office of the territory, the Denver Company caused a survey to be made of the route through the Grand or Big Canon of the Arkansas, for the purpose, as declared by the engineer who conducted it, of retaining control of the canon for that company. That survey, *extending through the entire length of the canon*, is described by him as a 'close preliminary,' that is, a line very near location, without an actual location of the curves. But the location of the curves, he testifies, could have been made in his office away from the canon. With that exception, he pronounces it to have been a complete survey. *The line thus surveyed was marked by stakes every hundred feet, numbered consecutively, and at points where it seemed necessary, a plus or stake between the hundred feet was added.*

* * * From the date of the survey made in 1872 down to April 19, 1878, the record furnishes no evidence that the Denver Company actually occupied that defile for any purpose whatever. *On that day*, however, Congress having extended the time to ten years from the date of the original act within which to complete its road as far south as Santa Fé, *that company did, by its agents, occupy the narrow portion of the canon, known as the Royal Gorge, with the avowed intention of constructing its road upon the line of the surveys made in* 1871 *and* 1872.

* * * "As to the surveys of 1871 and 1872, although defective in some particulars, and not equivalent to actual location or appropriation of the way, they were quite as complete and extended as the survey which the Canon City Company caused to be made in 1877. The evidence shows, beyond all question, *that when the latter survey was made there was seen in the canon all or very many of the stakes which the engineers of the Denver Company had put there in* 1871 *and* 1872. *Those who made the survey in* 1877 *undoubtedly knew when, by whom, and for what purpose those stakes had been then placed.*

* * * "Its surveys of 1871-2, followed by an occupancy *of the canon* on the 19th of April, 1878, in advance of the Canon City Company, for the purpose of constructing its road through that defile, was, in our judgment, a final appropriation of the way granted by Congress.

* * * "It results from what we have said that the court below erred in enjoining the Denver Company from proceeding with the construction of its road in the Grand Canon."

The court below, upon one occasion since the judgment of this court was rendered, has taken an even stronger view. In treating one phase of these cases, Judge Hallet said, Miller, J., concurring:

"But if the Rio Grande Company had the prior right at the point of beginning, which was down at Canon City, it would relate to all the line; because when one company secures the right to locate a line along these mountains it cannot be said that another company, by going a few days or weeks in advance of them, can secure a prior right. The right to begin is the right to go on. If it is true that one might step in just in advance of the other and purchase, then the right to begin would be valueless. If we should say that the Rio Grande Company has the first right to begin, and no further right, we should in effect, grant them nothing; because considered in and by itself, taken separate from the rest of the line, the right to build from the twentieth mile post is of no value whatever. For that reason the decision of the Supreme Court as to the right to begin at Canon City and to build in the Grand Canon, is a declaration that they

> may go on; that they have the better and first right to locate their line clear through to Leadville; because the line must be taken as a whole and considered as a whole. And so we say, that the fact which may be taken to be proved, that the Pueblo Company was first in the field to locate its line and begin work above the twentieth mile post, is not controlling. If the Rio Grande Company has the better right to the Grand Canon, it has the same better right all the way to Leadville."

That Judge Hallet has since, in some degree, departed from this application of these rulings does not impair their force as here applied.

These principles and findings seem to be conclusive of the question of extent.

VII. The final proposition of the brief is that even if the Denver Company's prior right extends the whole length of the canon, nothing is involved which should disturb the Canon City Company's occupancy of the road it has constructed in the broad part of the canon.

Touching this broad part of the canon, the averments of the Canon City Company's second supplemental bill are:

> "And your orator further shows unto your honors that up to the entrance into the said Royal Gorge, it was, in the year 1877, ever since has been, and still is, entirely practicable and feasible to construct a railroad from the south side of the Arkansas River in every respect equal to the one which has been or might be constructed upon the north side of said river to said entrance into said Royal Gorge, *and that a railroad so constructed upon the south side of said river from said Canon City to the entrance into the said Royal Gorge at the point hereinbefore mentioned, could be maintained and operated with equal ease and feasibility, and at no greater expense than the one constructed upon the north side of said river.* But your orator admits that the first cost of construction of a road upon the south side of said river would require a larger expenditure of money than one upon the north side of said river."

Let it be now remembered that the Canon City Company, when it attempted seizure of the Grand Canon, both found the Denver Company already there, and had already notice of its surveys and location the whole length of the canon.

Under these circumstances to assert that the Denver Company's establishment of its own right to its own location gives no sufficient reason why that company should be restored to that location, may well invite attention to the grounds on which it is put forth:

a. The first of these, as given in the brief, is that "the rights of these two companies, under the act of March 3, 1875, were declared by this court to be *equal and common.*"

In reply, does "equal" right involve that one company may needlessly and forcibly eject another from locations which the latter was the first to occupy and use, and when the latter's right has been established by the courts, retain what it has seized, simply because it has possession? Our view of right to "use in common," where the pass is reasonably wide enough for two, has been already given. It recalls the language of the statute, "that any railroad company shall not prevent any other railroad company from the use and occupation of such canon, pass, or defile for the purposes of *its* road, *in common with the road first located.*" We cannot understand this as intending, less or more, than separate locations, where there is room enough. It seems as if it otherwise must mean that wherever the topography may constitute a "canon, pass, or defile," one company may insist upon the right to use another company's road, though there be room alongside for it to build its own.

b. The second of these grounds for the main proposition (VII.) is, that the "prior right" was, in the court below, defined to be merely a prior right to construct, and that this court, in reversing the decrees, simply declared the right to be in different ownership, without altering the definition of the right.

In reply: The prior right to construct seems to involve the subject to locate the prior construction. Further, on the same page of the brief (p. 17), with this suggestion, is quoted the definition of respective rights given by Hallett, J., in that opinion upon which the reversed decrees were based. It reads: "That the Rio Grande Company may be 'admitted to the same right of way, if there is room for two 'roads in the canon, seems to be clear, and *perhaps that com-* '*pany may be permitted to use the track of the San Juan Com-* '*pany, if there is room for but one road.*"

We deem this reply conclusive, and in exact accord with our construction of the statute.

This court, indeed, declared in its opinion, that "when 'the Grand Canon *is broad enough* to enable both compa- 'nies to proceed in the construction of *their respective roads* 'they should be allowed to do so."

If two or more railroad companies have equal and common right to locate through a pass their separate roads, that company which first exercises its equal right to locate, acquires thereby its choice among the practicable routes. The second in its later exercise of equal right, chooses among those routes not chosen by the first.

d. The final suggestion of the brief, in behalf of the proposition (VII.) that the Canon City Company should keep what it has siezed, because it has in the meantime built upon it, is devoted, strangely, to the "general principles of equity." Two of these are specified as applicable here:

1. It is said that if the Denver Company had built, pending the appeal, in the broad part of the canon, on a location outside of its own, another road, "it would have suf- 'fered nothing except damage in money, which the other 'company could have paid *to an extent that should make the*

'*beneficial enjoyment of the canon equal.*" The Canon City Company, it is said, ought not to suffer for the failure of the Denver Company to build.

This loses sight entirely of continuing economies in working.

2. The Canon City Company, it is said, having built its road in good faith under the decree appealed from, and perhaps borrowed money on its title, should not be ousted unless necessary to prevent a failure of justice, and under no circumstances without compensation.

To support this proposition the brief quotes from I. Story's Eq., § 655, as follows: "When one tenant in common, sup-'posing himself to be legally entitled to the whole premises, 'has erected valuable buildings thereon, he will be entitled 'to an equitable partition of the premises, so as to give him 'the benefit of the improvements; or, if that cannot be 'done, he will be entitled to a compensation for those im-'provements."

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in the Canon City Company. They made preparations to take immediate possession of the canon in behalf of the last-named company. Evidence of their diligence and activity in that direction is found in the fact that on the morning of the 20th, as early as four o'clock, a small squad of their employees, nine or ten in number, under the charge of an assistant engineer, swam the Arkansas River, and in the name of their company took possession of the canon. Under the circumstances, it is not material that they failed to find a rival force in the canon at such an unseasonable hour. That squad was followed the same day by a large and overpowering force of workmen under the control of Robinson."

Here, in reply, the general position of the Denver Company may properly be stated, in a summary way, with which this review will conclude:

I. The Denver Company is seeking an immediate restoration to its own location to the full scope of that extent, but it is not seeking to acquire without compensation what the Canon City Company has constructed on its ground.

II. The Denver Company asserts a right to offset and charge up against such compensation whatever properly-considered damage it may show as suffered by it from the action of the Canon City Company and its successors.

III. These rights the Denver Company seeks to have established by enforcement of the mandate of this court, directing that it be put in possession, subject to a lien upon its title for whatever sum may be finally found due from it in settlement of equities.

It will thus be left to enjoy that possession till its rights are finally determined.

WAGER SWAYNE,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

THE UNITED STATES, *EX REL.* THE DENVER & RIO GRANDE RAILWAY COMPANY,

vs.

THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF COLORADO.

STATEMENT OF THE CASE.

This is an application for a writ of mandamus, to the Circuit Court of Colorado, to compel the execution of the mandate of this Court, in the cases No. 811 and 812, at the last term, Denver & Rio Grande R. W. Co., *vs.* C. T. Alling and others, and the same parties *vs.* the Cañon City and San Juan Company, and others.

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In the opinion, this Court says, that "the Denver com-"pany should have been allowed to proceed with the con-

"struction of its road, unobstructed by the other company. "Where the Grand Cañon is broad enough to enable both "companies to proceed, without interference, they should "be allowed to do so. But in the narrow portions of the "defile, where this course is impracticable, the Court, by "proper orders, should recognize the prior right of the "Denver & Rio Grande Company to construct its road. "Further, if in any portion of the Grand Cañon it is im- "practicable or ~~unprofitable~~ impossible to lay down more than one "road-bed and track, the Court, while recognizing the prior "right of the Denver company to construct and operate "that track for its own business, should by proper orders, "and upon such terms as may be just and equitable, es- "tablish and secure the right of the Cañon City company, "conferred by Act of March 3d, 1875, to use the same road- "bed and track, after completion, in common with the "Denver company."

"The decrees in these cases are, (said the Court), there- "fore reversed with directions to set aside the order grant- "ing an injunction against the Denver & Rio Grande Rail- "way, and also the order dissolving the injunction granted "in its favor, and dismissing its bill. By proper orders, "entered in each suit, the court below will recognize the "prior right of that company to occupy and use the Grand "Cañon, for the purpose of constructing its road therein, "and will enjoin the Cañon City & San Juan Railway Company, its "officers, agents, servants and employees, from interfering "or obstructing that company, in such ~~use and occupation~~ occupancy, "or use and construction. It may be that during the pend- "ing ~~ency~~ of these causes in the court below, or since the rendition of "the decrees appealed from, the Cañon City & San Juan "Railway Company has, under the authority of the Court, con- "structed its road-bed and track in the Grand Cañon or

"some portion thereof. In that event *the cost incurred in* "*those portions of the canon, which admit of only one* "*road-bed and track* for railroad purposes, may be ascer- "tained and provided for, in such manner, and upon such "terms and conditions as the equities of the parties may "require."

The mandate required the Court to do two things: (1) to set aside the order granting an injunction against the Denver & Rio Grande Company; (2) to set aside the order dissolving the injunction granted in its favor, and dismissing the bill.

The mandate authorized the doing of a third thing, if a supposed fact appeared to be true. If ~~true~~ since, the courts decree the Cañon City company had constructed its road-bed in the Cañon, the costs of such portions thereof which admits of only one road-bed, might be ascertained and provided for in such manner, and upon such terms and conditions as the equities of the parties might require.

On filing the mandates in the court below, the Denver & Rio Grande Company made motion after motion to enter up decree according to the opinion of this Court. These motions were often accompanied by tenders of security for all such sums as might be decreed under the order of this Court. The court first postponed and then refused to execute the decrees of this Court.

Neither the Cañon City company, nor the Atchison, Topeka & Santa Fe Company, nor the Pueblo & Arkansas Valley Company, not a party to either suit, or the Atchison company, ever filed a petition or made a representation to the court below, that any road or part of road had been built in the cañon, where only one track could be laid down.

They were allowed to file *supplemental* bills for relief, which could only be granted in a new and original bill, contrary to the general practice of the courts of equity. See,

Milner *vs.* Milner, 2 Edwards' Ch., R. 114.
Pinch *vs.* Anthony, *et al.*, 10 Allen, 477.
Adams' Equity, 413.
Tomkin *vs.* Lethbridge, Cooper's Eq., R. 43.
Land and wife *vs.* Cowan, *et als.*, 19 Alabama, 297.
Vaughan *vs.* Vaughan, 30 Ala., 329.
Hill *vs.* Hill, 10 Ala., 527.
Byrne *vs.* Byrne, 1 Drury & W., 71.
~~Davidson *vs.* Foley, 2 Brown's C.C., 598.~~
Pilkington *vs.* Wignall, 2 Mad., R. 240, 244.
Pritchard *vs.* Draper, 1 Russel & Mylne, 191.
Godfrey *vs.* Tucker, 33 Beavan, 285 n.
Beardmore *vs.* Gregory, 2 H. & M., 491.

But no party of any of the various defendants ever filed or made to the court below, an application for compensation under the decree of this Court.

There were two reasons for this:

(1) The defendant's evidence showed that there was room everywhere through the cañon for two roads.

(2) The filing of such a petition by the Atchison company would have been a complete abandonment of their pretended lease.

But the court below did not simply refuse to execute the mandate of this Court. It actually enjoined the Denver & Rio Grande Company from building on their right of way, decided to belong to them by this Court, until the court below could enquire into and ascertain the cost and expenses which the Atcheson, Topeka & Santa Fe had made, in trespassing on the right of way of the Denver & Rio Grande Company, with a view and intent to compel the Denver &

Rio Grande Company, to pay, not what this Court said might be a proper charge for work in the cañon where there could be but one road, but for work done by the Atchison, Topeka & Santa Fe, all the way over the twenty-two miles which this Court decided belonged to the Denver & Rio Grande, but the right of way up to Leadville.

In stating the facts, we here state the argument. The order of the court below is just as much against the mandate as if the latter had never been written. It is just as much against the known principles of English Common Law and Equity as if a trespasser was to go on one of the lots owned by any of the judges in Washington and build a house on it, not only against his hearty protest, but against his repeated application to the courts to prevent him from so doing, and thus the trespasser, when beaten in the highest court of the land, should ask pay for his wrong-doing.

This Court has repeatedly passed upon the duties of the inferior courts, to whom its mandates are addressed.

In *ex parte* Sibbald, appellee, *vs.* The United States, appellant, 12 Peters, 488-492, this Court decided that a writ of mandamus was the proper remedy to enforce obedience to the mandate, issued from this Court in place of an execution under laws of the United States, and practice of the court in pursuance thereof. In the course of the opinion in that case, the Court, page 492, said: "No prin-"ciple is better settled, or of more universal application "than that no court can reverse or annul its own final de-"crees or judgments, for errors of fact or law, after the term "in which they have been rendered, unless for clerical mis-"takes, (13 Wheaton, 591, 3 Peters 431,) or to reinstate a "cause dismissed by mistake, (12 Wheaton, 10); from

"which it follows that no change or modification can be "made, which may substantially vary or affect it, in any "material thing."

When the Supreme Courts have executed their power in a cause before them, and their final decree or judgment requires some further act to be done, it cannot issue execution, but shall send a special mandate to the court below to award it. 24th sec. Judiciary Act, 1 Story's Laws, 61. "Whatever was before the court and is disposed of, is con- "sidered as finally settled. The inferior court is bound "by the decree, as the law of the case, and must carry it "into execution according to the mandate. They cannot "vary it, or examine it, for any other purpose than execu- "tion, or give any other or further relief, or review it, upon "any matter decided on appeal for errors apparent, or in- "termeddle with it, further than to settle so much as has "been remanded."

In West *vs.* Brashear, 14 Peters, 51–54, this Court said:

"The mandate must be the guide of the court below. "It is the judgment of this Court transmitted to the Circuit "Court, and when the direction contained in the mandate "is precise and unambiguous, it is the duty of the Circuit "Court to carry it into execution, and not to look else- "where for authority to change its meaning."

In Chaires *vs.* The United States, 3 Howard, 611–620, it was held: "When this court has affirmed the title to "lands in Florida, and referred, in its decree, to a particu- "lar survey, it would not be proper for the court below to "open the case for a re-hearing, for the purpose of adopt- "ing another survey.

"The court below can only execute the mandate of this "court. It has no authority to disturb the decree, and can "only settle what remains to be done."

Page 620: "A petition for a re-hearing was filed, &c. "This the court in Florida had no power to do, because "the decree, if this court made an affirmance of that below, "is conclusive on the inferior court, and it has no author- "ity to disturb it by the mode proposed, but can only exe- "cute the mandate, and settle so much as remains to be "done."

Referring to *ex parte* Sibbald, and the rules there laid down, to which nothing need be added, as they are altogether adverse to the present proceeding.

In *ex parte* Dubuque & Pacific Railroad, 1 Wallace, 69, (the court below granted a new trial after the cause was reversed here,) the court said:

"The 24th section of the Judiciary Act governs the prac "tice in cases brought up and reviewed in this court. It is "bound to give such judgments as the court below ought "to have given, and the law directs that a mandate shall "be sent down to have the judgment entered as final in the "lower court, when it is for the defendant below, as here. "The District Court had no authority to set aside the judg- "ments of the Supreme Court, its authority extending only "to executing the mandate."

In *ex parte* Morris & Johnson, 9 Wallace, 605–607:

"It is the duty of the court below to obey and give ef- "fect to the mandate of this Court, as far as practicable."

We have but a few words to add to these authorities. It was the duty of the court at once to set aside the injunctions and allow the Denver & Rio Grande Company to build their road.

If it had been made to appear that any work had been done, where only one road in the cañon could be built, the

court could and should have made an order to protect it, and the Denver & Rio Grande Company tendered security for such a purpose; but the court had no right, under the mandate, to delay the execution of the order, that it might enquire into and settle other rights claimed against the Denver & Rio Grande Company. These were all, *inter alios acta*, and could not delay the execution of the decree. The court could grant no new trial. It could not delay execution to try other questions.

GRANT & GRANT,
For Denver & Rio Grande Company.

THE UNITED STATES *ex rel.* THE DENVER AND RIO GRANDE RAILWAY COMPANY,

vs.

THE JUDGE OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

Brief for Relator.

For convenience reference will be made to the transcript of proceedings in the Circuit Court of Colorado after the mandate of the Supreme Court in this cause as *print.*

May 13th last the mandate of this Court was filed, and a motion made for decree upon the mandate (print folio 88). On the same day (print folio 90) a motion was made by another corporation, the Pueblo and Arkansas Valley Company, in the Court for leave to it to file a supplemental bill in this cause, which motion was taken under advisement.

Afterwards (print 92) leave to file supplemental bill was granted and supplemental bill filed (print folio 95 to 144 inclusive). Especial reference is made to the prayer of

that bill. It is "and that upon the hearing the original decrees herein may be permitted to stand without modification or change." That bill set up, among other things, the consolidation of the company filing it, namely the Pueblo & Arkansas Valley Railroad Company, with the Cañon City & San Juan Railway Company, the defendant in this Court.

The articles of consolidation are made exhibit A (of print folio 147 to 172 inclusive). It also set up four other proposed agreements among other parties (commencing print folio 175 and ending folio 282 inclusive).

These agreements purport to be made after the decree in the Circuit Court from which the appeal was taken and which was reversed by this Court.

The agreements embrace the proposed lease of appellant's completed road to the Atchison, Topeka & Santa Fé Company, a Kansas corporation (exhibit C folio 182), a provisional agreement for this lease (exhibit B), a proposed agrement for the purchase of a majority of the capital stock of this company (exhibit D, folio 175), and an escrow agreement (exhibit E). The escrow agreement made the two former conditional.

These proposed agreements, exhibits B, C, D and E, were made in October, while the supposed consolidation agreement was made in September preceding, filed in the office of the Secretary of State on the 12th day of September, 1878 (printed folio 174).

The subsequent agreements B, C, D and E do not refer to or recite the consolidation agreement; therefore, whether that agreement was made or not, and whether it is valid

was not affirmed by any recitals so as to create an estoppel upon the Denver & Rio Grande Company; and it was by virtue and because of these agreements that the Pueblo & Arkansas Valley Railroad Company in the supplemental bill before mentioned, justified itself in making the prayer hereinbefore stated.

That is, that because of these agreements, the litigation which had already been had was to be held for naught, and this new party to have the decree in the cause between the other parties affirmed.

This the Court will find to be the actual state of the case.

No effort was made to connect this new litigation with that which had already been determined by this Court. No case was made or intended to be made, whereby the Court should be asked to ascertain the expenditures in the cañon where it was impracticable to build but one road, but the mind of the adverse party was employed in an entirely different direction, namely, an intent manifested to defeat adjudged rights of the Rio Grande Company in the cañon.

This determination is made palpable upon an inspection of the petition of the Pueblo & Arkansas Valley Railroad Company (print fol. 284 to 291 inclusive). Afterwards June 26, 1879, a second supplemental bill was filed by leave of the Court.

That bill is found at *print* folios 294 to 323. In that bill the prayer is enlarged, and it is prayed that an account be taken of constructing divers portions of the railroad in question, which at folio 302 is alleged to be from C

City to the twentieth mile post, and it is alleged to have been constructed in several sections. Also a prayer for an account of the reasonable costs of 3 24-100 miles from Cañon City to the entrance of the Royal Gorge, and from a point after passing through the Royal Gorge on the south side of the river opposite to the end thereof to a point opposite the twentieth mile post, on the south side of the Arkansas river, for a distance of 11 63-100 miles, and that an inquiry may be made in such manner as the court shall direct relative to what rules and regulations should be prescribed for the joint use of said 6,600 feet through the Royal Gorge hereinbefore mentioned, and of the cost of maintenance, &c., and of the length of time required for the construction of a railroad for the distance of 21 92-100 miles to be used in the place of the railroad of your orator, sought to be appropriated by the Denver & Rio Grande Company.

It will be observed that in these pleadings and in the petition, folio 288, where this distance through the Royal Gorge is estimated at six thousand feet, and verified by Strong, General Manager of the Santa Fé Company. as well as in our answer in the cause decided by this court, it is uniformly claimed that there is about six thousand feet of the way where it was difficult or impracticable to construct two roads; but up to the time of the decision of this court our adversaries stoutly maintained that there was no reason why two roads could not be built in all parts of the cañon.

Their enlarged claim in their second supplemental bill obscurely hints at the possibility of a question of compensation arising for this six thousand feet; yet they stoutly maintained, as before, that in some form or other they are

to hold the Grand Cañon, in hostility to the rights granted to the Rio Grande Company by Congress. There is no offer to surrender upon being paid for such portion of the work as this court in its opinion indicated, but they want an account of the cost of the entire work upon the whole twenty-two miles of road, in and without the Grand Cañon, and an account of what it would cost to build a road elsewhere, evidently intending to pitch their case, finally, in such a way as to persuade the court to decree that, possibly, by their paying the difference, the Rio Grande Company can be forced to adopt some other line for its road.

The Rio Grande Company sought in every possible way to avoid entering upon this mode of litigation. They demurred to the second supplemental bill (*print* folio 325 to 328), in which demurrer its objections will be found succinctly stated: first, that it was an attempt to litigate in this suit matters which could be litigated only by original bill; second, that it was a litigation commenced and prosecuted by and between citizens of Colorado, involving no matter of which the Federal courts had jurisdiction. This demurrer was overruled, and both supplemental bills were answered (*print* folios 330 to 380, and *print* folios 397 to 423, inclusive). These answers deny the pretended consolidation of the Colorado corporations.

They deny the agreements B, C, D and E. They traverse the supplemental bills from first to last, and set up by way of defense the same matters specified in the demurrer, and further that the pretended contracts were void by the statute of frauds, so that the immediate question is, could these new matters by the rules and practice of equity, be

set up to hinder, delay or defeat the judgment of this Court?

The Rio Grande Company, notwithstanding these pleadings to the end of the term, insisted upon the decree being entered according to the mandate of this Court, and that the Circuit Court might not misunderstand the claim of the Rio Grande Company, a form of decree was prepared, and with the petition of the company presented to the Court, print folio 474 to 485. This Court will see upon an inspection of the form of decree demanded that the effort was made to have the Circuit Court follow strictly the mandate of the Court, affording the adverse party all possible advantage of everything decreed or intimated in its favor.

The claim was that the San Juan Company were only entitled to be compensated for work performed during the time that the decree of the Circuit Court was in force; that such work as it might have done before the injunction was ordered, and such as it might have done after the decision of this Court reversing it, was done at the peril of the party doing it, and that it could not invoke any rule or practice of equity to secure payment from the Rio Grande Company for any such work, and for that we now stoutly contend. Our desire is that this Court shall be impressed with the fact that at no time since the presentation of its mandate to the Circuit Court, has the Rio Grande Company abated one jot or title of its claim to have that mandate entered according to its terms. The company intended to waive no right, nor has it waived any.

The petition with form of decree was presented on the 7th of July (*print* folio 473). The response to that petition was made on the 14th of July (folio 448) by the entry

of an order appointing expert commissioners, interlocutory decree of the Court (*print* 448, 465, further modification, 466 to 467).

Having been advised that the Court proposed such interlocutory order, the Rio Grande Company (folio 431 to 443) filed with the Court its respectful protest againt such order, by which protest this Court will see that the Rio Grande Company steadily adhered to its demand to have a decree entered in accordance with the mandate.

By a misprint or a misprision of the Clerk, the order of the Court refusing to enter the decree prayed appears to have been made on the 5th of July instead of the 14th (*print* folio 427 to 429), but the decision of this Court in its mandate was enrolled by order of the Circuit Court in its records.

That the Rio Grande Company is entitled to have a decree entered in the Circuit Court in accordance with the mandate of this Court, will not be here argued. It has been so often decided by this Court that it is not in the power of the Circuit Court to change, alter or abate in any particular, by any order it can make, the decree of this Court that it is a waste of words to offer any argument or authority upon this point.

The contention of the Rio Grande Company is that the only delay which it was possible for its adversaries to occasion it in the entry of a full and ample decree in its behalf, according to the decision of this Court and its mandate, was such inquiry and litigation as might arise upon a *petition* to ascertain the value of the work done in the Royal Gorge during the time that the decree of the Circuit Court operated against the Rio Grande Company; that is to say, during the time that

elapsed between the date of that decree and the decision of this Court on the 21st day of April last. All work done outside of those times must in law be held to have been done at the peril of losing all compensation for it by the party who did the work. Good faith in the party doing the work is entirely out of the question. It is a misuse of words to say that work thus done was done in good faith. It was done for the purpose of obtaining an unconscientious advantage.

Such petition, a petition that would bring this matter before the Court, the San Juan Company sturdily refused to present, determined to reach its end in another way. Whether success shall attend its effort remains to be known.

The contention of the Rio Grande Company is that none of the matters stated in the supplemental bills are matters that could be brought forward to arrest the decree of this Court, or, indeed, that could be litigated under a supplemental bill in the suit decided by this Court; that if they can be brought forward at all, it can only be done in original bills.

Without multiplying authority, the following paragraph from Adams' Equity, 6th Am. edition, marginal page 412, we present as fundamental law: "It should be observed, however, that in order to warrant its introduction [that is, by way of supplemental bill] *the new matter must be supplemental to the old.* If, therefore, it is meant to show a new title in the plaintiff it is inadmissible, e. g., where a party having filed his bill as heir at law afterwards on his heirship being disproved purchased a title from his devisee; for the plaintiff must stand or fall by such title as he

had when his bill was filed." A confessedly bad title thus relied upon cannot be supported by a title subsequently acquired which is sought to be introduced by way of supplement.

Now everything set up in these supplemental bills upon which relief is prayed is traversed by the Rio Grande Company. It denies the consolidation; it denies that the alleged contracts, B, C, D and E, ever had any force or effect. Of course, before any success can be obtained the denials will compel the Pueblo & Arkansas Valley Company to sustain their allegations by proof, and if they shall succeed in sustaining them, their right will not be based upon any matter that was in litigation in the former suit, but upon subsequent and entirely new matters, facts which if well pleaded and proved will enable that company to obtain possession of the cañon without regard to any act of Congress whatever, or any right which the Rio Grande Company had anterior to the decree of the Circuit Court. The litigation is of new matter founded upon new title. This is too plain for argument.

In addition to that, there has been allowed to be engrafted upon the controversy a question of the right-of-way from Cañon City to the Grand Cañon, a distance of between three and four miles. This territory is in a manner out in the plain,—in the open country—no question of cañon, gorge, or defile involved in it. In the amended bill of the San Juan Company (folio 125) on file in the Circuit Court, on the 4th day of May, 1878, upon which the decision of this Court was based, is found the following averment: "Your orator further shows that at the time of the survey, location and platting of the said line of your ora-

tor's said road, *the lands over which the same was located were public lands of the United States*, and no part of it was within any military park or Indian reservation, or other lands specially reserved from sale; and in the former parts of the same bill, (folio 118) it was alleged that the location was between Cañon City and the mouth of the South Arkansas river, above the Grand Cañon. Yet now by the last supplemental bill, it is sought to change the ground taken in the former pleadings, and to maintain that these three or four miles of road from Cañon City to the mouth of the Grand Cañon, was not public lands but lands of which the San Juan Company had obtained the right-of-way from private parties, and so this litigation is sought to be protracted upon issues which the Federal Courts have no right to try, and by change of pleading and ground of defence and attack, to oppress and harrass, and vexatiously prevent the Rio Grande Company from securing its just rights as decreed by this Court.

It is plain that all these matters, if they can be brought forward at all, are to be brought forward by original bill, and they involve no question of federal jurisdiction whatever.

That this court may see the extent to which the Circuit Court allowed itself to be led away from the matters required to be considered and acted upon by the mandate, attention is called to the various special clauses of the order appointing the expert commissioners.

The first is to what extent must two roads if constructed, occupy the same ground from Cañon City to the twentieth mile post. The decision of this Court did not authorize any such thing to be done. Nobody claimed that there was more

than about six thousand feet where any such difficulty would arise, which was at the Royal Gorge. To that matter the Rio Grande Company succinctly and plainly called the attention of the Court in its proposed decree, and the order should have directed the experts (if they were appointed) to report upon that point only.

The second matter of inquiry is in like manner objectionable. The San Juan Company contended and proved in the causes decided by this Court, that there was no place through the whole Grand Cañon that it was not practicable to build two roads, without interference with each other.

It seems that the Circuit Court entirely mistook the decrees of this court The second clause of inquiry is not objectionable so far as it requires the experts to ascertain the cost and reasonable value of the work done in such narrow portions of the cañon as it was impracticable to construct two roads, but the inquiry should have been confined to the six thousand feet at the Royal Gorge.

So the third paragraph of the order of direction is objectionable, because the matter involved in that inquiry does not arise in construing the order and decision of this court. The question was, what was the value of the work done in those places, if any, where it was impracticable to construct more than one road?

The fourth subject of inquiry is clearly outside of any matter that was allowed to be put in issue or inquiry made. Cañon City is three miles below the Grand Cañon, and there was no question about the line of road from Cañon City into the Grand Cañon involved in any way or form whatever.

And so the fifth, sixth, seventh, eighth and ninth clauses of the order present questions that are entirely foreign to any matter concerning which the Circuit Court had any right to inquire.

It seems strange, indeed, that these matters should be made a subject of inquiry and great expense when the San Juan Company had neither by petition or otherwise besought any such inquiry. If that company had come forward upon the announcement of the decision of this court, and sought, as suitors ought to seek, to avail themselves of the generous provisions in its favor found in the decree of the court, the matter would have been ended long ago ; but the San Juan Company directly refused to avail itself, in plain and fair terms, of the beneficial decree of this court in its favor, but permitted it to be pretended to have been merged by consolidation with another company, whereby it had lost its identity and existence. Whether that was true or not, time and expense had necessarily to be incurred to determine it.

Yet, by the laws of Colorado, it is expressly provided that the " consolidation of one corporation with another or with others shall not affect suits pending in which such corporation or corporations shall be parties, nor shall such changes affect causes of action nor the rights of persons, in any particular. Nor shall suits brought against such corporation by its former name be abated." General Laws of Colorado 1877, §317.

Is not the Rio Grande Company justified in charging that this pretended consolidation and the bringing forward of a bill in the name of another company is a shift and a device to delay the entering of the decree of this Court,

and to harrass and oppress that company by unnecessary and unusual litigation? And has it not the right to demand as it does, that since the San Juan Company has contumaciously neglected to avail itself of the beneficial portions of the decree of this court, it may now in equity be held to have waived or lost such advantages, and that justly the decree ought to be entered dissolving the injunction of the Circuit Court, as prayed, and as decided by this court without any qualifications or reservation in behalf of the San Suan Company. We respectfully submit that such ought now to be the decree of the court, and pray that upon the hearing of this matter it will be so ordered.

This new party now appears upon the lost field in full armor, and demands to fight the battle over again.

The claim of the Rio Grande company plainly and emphatically is that by the laws of Colorado permitting the consolidation of corporations, such consolidation if attempted does not in any way or manner affect pending litigations, and that this case stands as though the adversary of the Rio Grande company had been silent from the day the decision of this court was pronounced.

Let it not be said that the laws of Colorado are not to be invoked to determine the practice in equity in the Federal Courts:—that is not the question; the question is what has been done by these two companies. If consolidated, it is only by the laws of Colorado; no other law can be invoked to justify or sanction such act. The statute of Colorado declares when a consolidation may take place, what must be done and the effect of whatever may be done reaching a consolidation, and this court will see that it is expressly declared that whatever the companies may do to

the end of consolidation, as to pending litigations, they are not consolidated at all.

The fact is that all this trouble has originated with and been carried on by the Atchison, Topeka & Santa Fé Company, a corporation created by the laws of Kansas, without power by the laws of Colorado or of Kansas, to enter into the pretended contract of lease, or to operate the Denver & Rio Grande road. That company is now using the name of the Pueblo & Arkansas Valley Company. The litigation ending in this Court emphatically put an end to the pretentions of the shadowy company, called the Cañon City & San Juan Company; it has dropped out of the contest.

If the decrees of this court are to remain unexecuted and buried in oblivion, and this Santa Fè Company can go on, using other corporate names to effect its objects in Colorado, and if it shall be so fortunate as to obtain decrees in its favor, from these decrees appeals may be had, and when reversed in this court, new schemes and devices will not be found wanting in the fertile imaginations of the managers of that company, by which new and further litigations may be organized, the end of which none can foresee.

Our prayer is that the decree already pronounced be entered without qualification, and the books closed as far as we have gone.

J. P. USHER,
L. K. BASS,
WELLS, SMITH & MACON,
For Petitioner.

IN THE

Supreme Court of the United States.

No. 10 ORIGINAL DOCKET.

IN THE MATTER OF THE APPLICATION OF THE DENVER AND RIO GRANDE RAILWAY COMPANY FOR A PEREMPTORY WRIT OF MANDAMUS TO THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO IN THE EIGHTH JUDICIAL DISTRICT.

ARGUMENT OF

THEODORE F. H. MEYER,

FOR THE DENVER & RIO GRANDE RAILWAY COMPANY.

New York:

E. WELLS SACKETT & BRO., LAW, BOOK AND JOB PRINTERS,

CORNER WILLIAM AND PINE STREETS.

1880.

IN THE

Supreme Court of the United States.

IN THE MATTER of the application of the Denver and Rio Grande Railway Company for a peremptory writ of mandamus, to the Judges of the Circuit Court of the United States for the District of Colorado in the Eighth Judicial Circuit.	*No.* 10, *Original Docket.*

BRIEF OF THEODORE F. H. MEYER FOR THE DENVER AND RIO GRANDE RAILWAY COMPANY.

This application arises from the refusal or omission of the said Circuit Court to proceed in accordance with the mandate of this Court in a certain cause between the Cañon City and San Juan Railway Company, complainant, and the Denver and Rio Grande Railway Company, defendant, (Bill and cross Bill) remanded to said Court after appeal by the defendant Company to this Court, from the decree of said Circuit Court, entered in said cause on the 24th day of August, A. D. 1878, as in the mandate set forth.

I.

THE ORIGINAL CAUSE IN THE CIRCUIT COURT.

This was a cause in Equity brought by the complainant therein to restrain the defendant as prayed in the bill.

It appears that this cause came on to be heard at the May Term, 1878, of the Circuit Court, upon the pleadings of the parties respectively, and the testimony heard before the Court, in a certain other cause in Equity at the same Term of that Court depending, wherein the Denver and Rio Grande Railway Company was plaintiff, and Ebenezer T. Alling *et al.* were defendants, which, by agreement, was also heard and considered in the first-mentioned cause (Record fols. 77–78.)

The questions raised involved the right of the respective litigants to construct their railways on lines theretofore located by each over the *public domain* in the defile known as the Grand Cañon of the Arkansas River.

The Denver Company claiming the right under the Act of Congress, approved June 8, 1872, entitled "An Act granting the right of way through "the public lands to the Denver and Rio Grande "Railway Co.," (17 U. S. Stats. at Large, 339,) and the several acts declaratory and amendatory thereof respectively approved March 3, 1875, (18 U. S. Stats. at Large, 516,) and March 3, 1877, (19 U. S. Stats. at Large, 405,) to appropriate the public lands for its road and right of way to the extent of one hundred feet on each side of its track, and for depot grounds and other purposes, as in said acts provided.

The grant of this right the Denver Company insisted was a "grant in presenti," and amounted to an

exclusive right to use that defile for the purposes of its railway, because of the topography of the country, or, in other words, as the defile was at certain places but forty feet wide, and its right of way occupied the entire width of the defile, the Canon City Company was necessarily excluded; and in support thereof alleged an appropriation of its line in 1871.

The Canon City Company, on the other hand, claimed the right to construct its road through that Canon, under an act of Congress, approved March 3, 1875, (18 U. S. Stats. at Large, 482,) and certain proceedings thereunder, whereby a map of its surveyed line was filed and approved by the Secretary of the Interior, at some time in the year 1877.

This map, the evidence in the case shows, comprised the Cañon City Company's alleged choice of location of its road from a point about three miles westward from Canon City, to the end of the twentieth mile west of Canon City, in all about seventeen miles more or less.

The line of the Canon City Company, as surveyed, located, and marked on said map, covered substantially the line of the Denver Company, or seriously interfered therewith.

The Canon City Company also set up abandonment by the Denver Company.

The primary question, therefore, was, which of the companies had the prior right; and if such prior right was in the Denver Company, then the secondary question arose, could it exclude its antagonist by reason of its right to two hundred feet under the act of 1872, as amended in 1877.

The Circuit Court decreed that the Canon City Company had the right to proceed with the con-

struction and completion of its road *along the line marked* on its map, and enjoined the Denver Company from interfering (See record for 79–80.)

The Court, however, allowed the Denver Company to proceed with the construction of a railway up the valley of the Arkansas, through that defile upon *any* proper line it might select, provided it did *not interfere* with the Cañon City Company in the construction and operation of its line.

The effect of this decree was to give the *prior right*, or the choice of location to the Cañon City Company, and likewise to confine that right to the line marked on its map, and to prevent the Denver Company from constructing its railway on its chosen line, wherever that line interfered with the line of the Cañon City Company as marked on that map for the entire distance of seventeen miles more or less.

An appeal was taken by the Denver Company to this Court, and under stipulation the cause was submitted at the October Term, 1878, and decided on the 19th day of April, 1879, together with the other cause above mentioned.

II.

THE MANDATE.

The mandate of this Court, after reciting the decree of the Circuit Court and appeal therefrom, *reversed* that decree, and remands the cause for further proceedings to be had therein in conformity with *the opinion of this Court.*

III.

THE OPINION.

On the the primary question this Court ruled in favor of the Denver Company. The Court say:

"The intention of Congress was to grant to the "company (the Denver and Rio Grande) a *present* "*beneficial easement* in the particular way, over "which the designated routes lay * * * When "such location and appropriation took place the "title * * * by relation took effect as of the "date of the grant," that is, June 8, 1872." (Record, fol. 47).

On the secondary question the Court held that inasmuch as the act of '75, Sec. 2, provided that *any* railroad company *whose right of way*, or whose track or roadbed upon such right of way, passes through any canon, pass or defile, should *not prevent*, etc., and the Denver company's time was enlarged in 1877, two years after the passage of that act, it could not claim the right to the full extent of one hundred feet on each side of its track, wherever the full enjoyment of that right would work the exclusion of another company (Rec., folios 61–70).

The Denver Company, however, had insisted on the enjoyment of its right of way to the full extent, at least as to the part of its line which it had surveyed in 1871 and 1872, and wheron it had done some grading—claiming such survey and work to be an appropriation made prior to the act of 1875. On this point this Court say, in the opinion:

"To this proposition we cannot yield our assent. "The right of way through that pass was not, in "itself, and separate from the right of way along the

"whole route, * * * the grant was an entirety "as to the right of way over all the lands lying on "the route designated in the charter of the com- "pany" (see Rec., fols. 48, 50).

The Court conclude the opinion; "The Denver "Company should have been allowed to proceed "with the construction of its road unobstructed by "the other Company" (fol. 71). * * "The de- "crees in these causes are, therefore, reversed" with directions in effect:

Fol. 73.

1. To dissolve the injunction against the Denver Company.

2. To reinstate the injunction originally granted *pendente lite* in the Circuit Court, against the Cañon City Company; and

3. The Court say:

"It may be that, during the pendency of "these causes in the Court below, or since the "rendition of the decrees appealed from, the "Cañon City and San Juan Railway Company "has, under the authority of the Circuit "Court, constructed its road-bed and track "in the Grand Cañon, or in some portion "thereof. In that event, the cost thus in- "curred *in those portions of the canon* which "admit of only *one road-bed* and track for "railroad purposes, may be ascertained and "provided for in such manner and upon such "terms and conditions as the *equities* of the "parties may require."

Fol. 74.

It may as well be now here stated, although, perhaps, in a measure anticipatory, that while in the pleadings in the original case the Cañon City Com-

pany claimed that *more than one* track could be constructed everywhere through that defile, and the Denver Company claimed the contrary thereof to be true; yet in a supplemental pleading hereinafter mentioned a company claiming to be the successor of the Cañon City Company, with special reference, doubtless, to that passage of the opinion, insisted that but one track could be built at certain points; that the Circuit Court, however, in its decree of January 2, 1880 (see pages 7–11 of the supplemental record) determined that the construction of two tracks is possible at all points in the defile; (see par. XII, supplemental record, page 11; also, *Second*, on page 13 of supplemental record; and page 14 of same record, where the Court's commissioners in answer to the first interrogatory found at fol. 455, original record, report, [which report is in par. XII of the decree referred to]: "according to plan "*second* * * * "they need not occupy the same "track at any point.)"

The effect, as we claim, of the opinion is that the contending parties had not equal or co-ordinate rights, but that the Denver Company, having the *earlier grant*, must be allowed to enjoy a *prior right;* that it must, however, so use its rights as not to monopolize the defile to the exclusion of its antagonists, and we understand this prior right to be based not on an *earlier location* but on the earlier grant by Act of Congress of June 8, 1872, as amended in 1877.

No other construction seems admissible, if the decision is viewed in the light of other decisions of this Court in cases involving the same principles.

In this case the Court say:

"Of what the Company had done, prior to the pas-
"sage of the act of 1872, towards effecting the objects
"of its incorporation, Congress, it is fairly to be

" presumed, was not uninformed. It was aware, we " must also presume, of the *routes* designated in the " charter of the Company *for the main road and its* " *several branches*, all so connected as to constitute " when completed, an extended railway system for " that entire region. That Congress was so informed " is quite clearly indicated by the terms employed " in the act of 1872. That act must, therefore, re- " ceive the same construction which would be " adopted had it contained a full or detailed de- " scription of the routes of the main line and " branches. In this view, and having due regard to " all the circumstances and conditions of the Com- " pany, when the act was passed, we do not doubt " that the intention of Congress was to grant to the " Company a present beneficial easement in the par- " ticular way over which the designated routes lay, " capable, however, of enjoyment only when the " way granted was actually located, and, in good " faith, appropriated for the purposes contemplated " by the charter of the Company, and the act of Con- " gress. When such location and appropriation " took place, the title, which was previously im- " perfect, acquired precision, and by relation took " effect as of the date of the grant. The settled " doctrines of this Court would seem to justify that " conclusion.—(21 Wall, 44; 9 Wall, 95; 2 Otto, " 741; Mo., Kan. & Tex. R. W. Co. *vs.* Kansas Pac. " R. W. Co., Oct. Term, 1878.)"

Fol. 45—48.

In the case of the Missouri, Kansas, and Texas *vs.* the Kansas Pacific (97 U. S., VII. Otto, page 491), the Court say :

" It is always to be borne in mind, in construing a " Congressional grant, that the act by which it is " made is a law as well as a conveyance, and that such " effect must be given to it as will carry out the intent

"of Congress." * * * "The construction thus "given to the grant in this case is, of course, applic- "able to all similar Congressional grants, and there "is a vast number of them; and it will tend, we "think, to prevent controversies between the "grantees and those claiming under them respecting "the title to the lands covered by their several "grants, *and put an end to struggles* to encroach "upon the rights of others *by securing an early* "*location.*"

And what object could Congress h[ave] in passing the Act of 1877, granti[ng] Company more time to complete it[s] road as far south as Santa Fé, in New Mexico, and giving such grant of more time the form of an *amendment* to the *original* Act, by substituting for words there used words of larger import (see VII. Otto, lower half of page 497), if it was not, that notwithstanding the defile Act of 1875 the Denver Company should have a better right to use the defiles along the routes described in its charter, than it could obtain under the Act of '75, or in other words, rights prior and superior to any acquired or to be acquired by any other Company under that Act.

In fact this Court pronounce the rights of the Denver Company to be prior, for the Court say:

"By proper orders, * * * the Court below will "recognize the prior rights of that Company (refer- "ring to the Denver Company) to occupy and use the "Grand Cañon for the purpose of constructing its "road therein" * * * (fol. 73).

Priority excludes the idea of equality.

The rights of the Cañon City Company are subordinate to those of the Denver Company.

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also cases cited
Supreme page 500
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The passage in the opinion (see fols. 56 and 57.)

"As to the surveys of 1871 and 1872, although "defective in some particulars, and not equivalent "to actual location or appropriation of the way, "they were quite as complete and extended as the "survey which the Cañon City Company caused to "be made in 1877. The evidence shows, beyond all "question, that when the latter survey was made, "there was seen in the cañon all or very many of "the stakes which the engineer of the Denver Com- "pany had put there in 1871 and 1872. Those who "made the survey in 1877, undoubtedly knew when, "by whom, and for what purpose those stakes had "been there placed. Nor had they sufficient reason "to suppose that the Denver Company had finally "abandoned its purpose of constructing a road "through the canon."

And the passage at folio 60:

"Its survey of 1871–1872 followed by an occu- "pancy of the canon on the 19th of April, 1878, in "advance of the Cañon City Company, for the pur- "pose of constructing its road through the defile, "was in our judgment, a final appropriation of the "way granted by Congress," cannot be distorted into a meaning that by virtue of an *earlier location* the Denver Company had a prior right. That would be in *direct conflict* with other parts of the decision and established principles.

These passages contain but the answer to the argument urged by the Cañon City Company on the appeal that the Denver Company had abandoned its line through that defile

The Court, in effect, say to the Cañon City Company: You had notice of the rights claimed by the Denver Company; your agents saw the stakes and other evidences of the survey made by that Com-

pany in 1871-2; you witnessed its gradual progress until the general depression compelled it to suspend, and, notwithstanding, you attempted to locate on substantially the same line.

It is the foundation for the conclusion of the opinion directing compensation to be made *only* for such work as might have been done under the Circuit Court decrees, where *but one track* was alleged to be possible.

It will probably be claimed that both companies have a right in common to use the defile, but such a construction is inadmissible if the term "*in common*" be intended as co-extensive with the term "on equality." Conflicting easements cannot coexist, one must have precedence and the other be subordinate, and the opinion itself negatives such a construction, for it awards a *prior* right to the Denver Company: The passage of the opinon at fol. 62. "At the date of that Act (the defile Act of 1875) "the road of the Denver Company, as we have seen, "had not been located through the Grand cañon "of the Arkansas. But it (the Denver Company) "had a *subsisting grant* of a right of way "through that defile. According therefore, to the "Act of March 3, 1875, the Cañon City Company, "* * *. might, for the purposes of its road, "occupy and use that cañon in common with the "Denver Company," must be read in conjunction with that passage (See fol. 72) where the Court say: "Further, IF, in any portion of the Grand Cañon "*it is impracticable or impossible* to lay down "*more* than *one road-bed* and *track*, the court, while "recognizing the PRIOR right of the Denver Com- "pany to CONSTRUCT and *operate* that track for "its own business, should, by proper orders, and "upon such terms as may be just and equitable, "establish and secure the right of the Cañon City "Co., conferred by the Act of March 3. 1875.

"to use the same *road-bed and track*. AFTER "COMPLETION, in common with the Denver "Company."

From which it is apparent that the term "in common," as used in the opinion, was intended to be limited and qualified by recognition of the existence of a prior private right, as is in consonance with established legal principles, in cases for instance where a public way was located over a private way, the Court held that the owner of the latter was not deprived of his rights, as such owner, in the same, against anyone who obstructs it (Washburn on easements, 3d ed., 7, on page 656 and cases there cited),

In one case (102 Mass., 451,) the grantor of two mills, one a grist and the other a saw mill, first conveyed the saw mill, and thereafter the grist mill, the deed of the latter only containing a covenant that the grantee thereof had precedence if there was not water enough for both, was held liable on the covenant; which sustains the theory that a precedence in the enjoyment of an easement might be created by grant, and would have been if the prior deed of the saw mill had contained proper restrictions; in another case (20 Vermont, page 250,) a precedence to an easement was held to have been acquired by prescription.

The opinion of this Court touches, it is true, upon other matters, which, however, are either foreign to the questions litigated in the main cases, or necessary *consequences* of the decision.

First, upon a question (entirely *independent* of the main case), presented on motion of a stranger to dismiss the appeals, which motion the Court *denied*, remitting the parties to their remedies in courts of original jurisdiction (see Record, fol. 39–40).

Second, upon two questions which legitimately could arise only *after execution of the mandate*, viz:

(*A*). As to simultaneous competitive construction in this narrow defile (which experience had shown to be impracticable). (See record, fol. 71–72.)

(*B*). As to operation of that portion of the Railroad, which (under the supposition that but one track was possible), the Denver Company would under the decision of this Court be necessarily obliged to allow the Cañon City Company to use in common (fol. 72).

And this Court anticipating that the effect of the decision would be to raise questions of that character if a given state of facts existed, direct the lower Court to regulate these matters by *proper* orders. (See Rec., fols. 71 and 72.)

That is, in other words, when on the application of either litigant such regulations appeared necessary, from the facts alleged and proved, to protect the rights of either under the decision.

IV.

The duty of the Circuit Court under the mandate and opinion was to enter a decree:

First. Dissolving the injunction against the Denver Company.

Second. Enjoining the Cañon City Company from interfering with the Denver Company in its *occupancy*, use and construction; and

Third. Providing for an inquiry to ascertain whether any portions of the cañon admitted of only one roadbed and track for railroad purposes; and if that be established, to ascertain whether the Cañon City Company had, *under the Circuit Court's authority*, constructed a roadbed and track in such portions, and if so, to ascertain the cost thus incurred, and provide therefor upon just and equitable terms to both parties.

V.

THE SUPPLEMENTAL BILLS AND THEIR EFFECT.

Instead of allowing the Denver Company's motion for a decree on the mandate, the Court allowed the alleged successor of the Cañon City Company to file two supplemental bills, the first of which recites all the proceedings in the original suits, the decrees of the Circuit Court, the appeals therefrom, the submission in this Court, and that the decrees appealed from were reversed, and the mandate filed on the 13th day of May, '79 (See fols. 95–119), and then proceeds to state that *after the appeals were taken the Cañon City Company and another corporation became consolidated and formed one company, the orator therein,*

Fols. 119–123.

Allegations, *by way of supplement* to the proceedings recited, and setting up a lease by the Denver Company to the Atchison, Topeka and Santa Fe Railroad Company, a Kansas corporation, and sundry cotemporaneous agreements, substantially all and ~~and~~ the facts which were in this Court urged to sustain the motion for the dismissal of the appeals, are

scattered throughout the Bill, but the principal ones may be found at fols. 123–129; then that the orator had a beneficial interest in the alleged contracts (fols. 129–132); that at the time the contracts were made the Denver Company and the orator were engaged in *competitive construction* westward of Cañon City; that the controversies and conflicts both and out of Court were disastrous, and that the contracts were made with the intent and design of ending the controversy

Fols. 132–134.

Then follows the old allegation that the Denver Company had abandoned its rights in a new form.

Fols. 134–139.

Then that the orator is advised that all the contracts and doings *therein alleged by way of supplement* constitute a RELEASE, and that whatever prior right the Denver Company might have had could not be availed of.

Fols. 139 and 140.

Then the orator alleges to have expended large sums of money (no amount mentioned) *acting on the faith of the alleged contracts.*

Fol. 142.

Then that the *causes remanded* should be heard *on the supplemental matters* at the *same time* they are heard on the *original records.*

THERE IS NO PRAYER FOR RELIEF other than that the causes may be heard on the supplemental matter, and that the original decrees *might be permitted to stand* without modification or change.

Issue was joined on this bill, the questions tried

on volumes of evidence, and *after a full hearing on the merits*, the bill was *dismissed*.

See Supplemental Record, page 8.

The second supplemental bill recites that the orator brings its *supplemental bill by leave of Court*, and alleges

1. A lease by one of its predecessor companies to the Atchison Company; the construction of 148 miles of road from the Kansas State line to Pueblo, and the operation thereof under the alleged lease by the Atchison Company; an agreement between the same predecessor Company and the Atchison Company to build from Pueblo to Leadville, and to lease the line when built, and as to their joint interests.

   Fols. 295–301.

2. That the other predecessor company, to wit, the Cañon City Company, had constructed a railroad from Cañon City to the end of the twentieth mile westward therefrom, which was then operated by the Atchison Company.

3. That the Atchison Company then operated its own line, and as lessee the lines of the orator, and those of the Denver Company as one line for the joint and mutual benefit, of the respective Companies, that large benefits accrued from the operation of the 20 miles west of Cañon City, and that a severance of that portion from the other lines would be injurious.

   Fols. 303–304.

4. The remainder of the bill is substantially devoted to allegations which, if proved, would amount to this:

(*a*). That of the entire line between Cañon City and the twentieth mile post, but $3\frac{24}{100}$ miles are over private condemned lands; that all the remainder, $16\frac{76}{100}$ miles, are on the public domain.

(*b*). That 6,600 feet of the $16\frac{76}{100}$ miles are in the Royal Gorge.

(*c*). That the orator had in good faith expended up to the date of verifying the bill (June 26, 1879), in the neighborhood of $500,000.

(*d*). That the entire construction was on the north side of the river.

(*e*). That a second line could be constructed on the south side of the river, from the point where the private lands end (about $3\frac{24}{100}$ miles west of Cañon City,) to the 20th mile post, except for the distance of 6,600 feet in the Royal Gorge.

(*f*). That the line on the south side would be more expensive to construct, but when constructed be equal to the line on the north side. and could be as cheaply operated and maintained.

(*g*). That as to joint use of the 6,600 feet, regulations will become necessary.

(*h*). Assertions of its good faith and of its rights to retain all the line are injected in several places, as also allegations that if the Denver Company was equitably entitled to anything they should build on the south side of the river to the Royal Gorge, and from its west end westward, and the

orator be allowed to pay the difference in the cost of construction and be permitted to retain the line on the north side.

5. As to the 6,600 feet in the Royal Gorge, the allegation is substantially (fol. 313), "*if it should be finally adjudged that the Denver Company has the prior right of way* for said distance of 6,600 feet through the Royal Gorge, it should pay before it should be allowed possession, and that such possession be made subject to regulations concerning joint use to be made in advance."

6. An allegation that the orator is entitled to possess all the Denver Company's constructed road is found on fol. 314.

7. Allegations that the Denver Company has no line *until it builds one*, and that it is insolvent are interjected.

8. There is no specific prayer for relief, except for an accounting as to the cost of construction, and for an inquiry as to regulations for the joint use of the 6,600 feet, and construction of a second line, but assertions and suggestions are scattered throughout the bill, which amount to this:

(*a*). That the orator is entitled to retain its line.

(*b*). That it should be paid for its line before possession be given to the Denver Company.

(*c*). That it should be allowed to use the present road (if it be awarded to the Denver Company) until it can build another one.

Issue was joined on this bill and testimony taken which proved, as the Commissioners report in the exhibits to their report, that the cost was near a million of dollars.

As to the first bill it is difficult to see how its allegations could be made the subject of a supplemental bill; yet it is such. It shows that another Company claims to have succeeded to the rights of the original complainant; all matters are averred by way of supplement; the motions ask for leave to file a supplemental bill, and such leave is granted.

Fol. 89–94.

The bill is defective, though; for while it avers a new title under a lease, the lessee itself is not a party, and could not be a party.

The question, therefore, between the Denver Company and the Atchison Company, its alleged lessee, as to which of the two was entitled to operate the Denver Company's road west of Cañon City could not therein be conclusively adjudicated, but even if it could have been finally adjudicated, the supplemental bill was bad. In addition to the authorities cited on this point by more learned associates, I submit

Evans *vs.* Bagshaw, Law Rep. 8 Eq., 469, 1869; per Lord Romilly, M. R.; and S. C. L. R., 5 Ch. App. 340, 1870.

As to the second supplemental bill, it is submitted that its allegations *present no case.*

The only part that in any manner refer to *matters pending*, are the allegations and prayer relating to the 6,600 feet in the Royal gorge, where it is claimed but one track could be constructed, that such track had been constructed, and it is prayed to ascertain the cost thereof. The rest

of the bill relates either to the future, with no facts to base action on, or contains appeals to the Circuit Court to, in effect at least, if not in terms, reverse the decision of this Court, and disregard the mandate.

The bill contains no allegations whatever, not even as to the 6,600 feet, that a railway could not be otherwise, and perhaps better and more advantageously constructed; no allegation either that the work done on the line and in the gorge was on the identical line, and of a grade adopted by the Denver Company; nor did the bill allege that the Denver Company threatened to *change* its *located line* and deviate therefrom with intend to inflict injury on the orator, or otherwise use its prior rights to appropriate work done by its antagonist; nor any allegation that the work done in the Royal gorge and elsewhere was done in good faith in reliance of the Circuit Court's decree.

On the contrary, if the two bills are read together, and the commissioners' report is considered, it conclusively appears that all work that was done since October, 1878, was done in reliance on the *contracts* set up in the first supplemental bill, which contracts the Circuit Court determined had not the meaning and effect imputed to them by the orator, and therefore brushed out of the way.

Page 3, Supp'l Rec.

That *this was the case* is apparent from the allegations as well of the first as the second bill. The first one says so outright, and the second by inference—the allegation relating to costs of construction gives the amounts expended, not to the 19th of April, 1879, the day when this Court decided the appeals, but up to June 26, 1879, more than two months later—it claims compensation, not for work done preceding the decision of this Court as to the

parts where compensation under a given state of facts was awarded to the Cañon City Company by this Court, but for all work done in and out of the Royal Gorge pending the appeal and after the decision thereon by this Court; and the commissioners report (while the second bill alleged an expenditure of only about $500,000), the cost at about a million at the time they reported, which shows conclusively that at least half, if not more, had been expended after the original decrees of the Circuit Court had been reversed.

Now, when it is considered that the Commissioners, after inspection, report, and the Court determines, that *two tracks* are entirely practicable in the *Royal Gorge*, (that is in that part of the cañon, where it was alleged but *one track was possible*) what remains of the claim to compensation and of the second supplemental bill?

Nothing but matter presenting no case at all—nothing but allegations of conclusions, which it was for the Court's to draw from facts alleged, but no facts at all are stated, for the very simple reason that none existed because the Denver Company had not yet been allowed to exercise its prior rights, it was only after the execution of the mandate that a state of facts could arise calling for the intervention of the Court on the subject of compensation and regulations relating to competitive construction and joint trackage.

It was then to be established which party, if any, interfered with the other or its property, arbitrarily and against good conscience.

Such is the nature of the supplemental bills which the Court allowed to be filed, and whereby the execution of the mandate was prevented.

It is submitted that *under no circumstances* should leave ever be granted to a party to file a supplemental bill after an appeal, except to give effect to the judgment of the apellate Court in case by *vis major* such judgment would otherwise become inoperative. (Cases of death, for instance.)

What would be the consequence of a different rule of practice? The judgment of the highest Court in the land is pronounced in favor of one party. A supplemental bill is filed by the other party in the Court below, the allegations whereof are brushed away as soon as the case is tried on its merits, and a decree is entered; from this decree the defeated party appeals, and, exercising a statutory right, secures a *supersedeas*.

The execution of the judgment of the appellate Court is tied up until that appeal is determined, and what is, if once established as proper, to prevent the *continued repetition* of this practice *ad infinitum*, or at least until the law's delays have determined the case in favor of the stronger party?

But no injury could possibly have resulted had the parties been compelled to proceed by original bill Had such a bill presented a proper case, it would have been within the powers of the lower court to restrain the Denver Company even *pendente lite* from availing itself of the benefits of any decree that might have been entered on the mandate. If, on the other hand, no proper case was presented, the rights of the Denver Company would have been available without delay.

Procedure is only the machinery of the law—the channel whereby it is administered, and the means whereby justice is reached; and it departs from its proper office when it is allowed to obstruct and even

extinguish legal rights, instead of facilitating them, and thus governs where it ought to subserve.

Which of the two practices should prevail under that rule admits of no doubt.

It is submitted that this Court direct the lower court to disregard the supplemental bills absolutely, at least as far as the execution of the mandate is concerned.

VI.

THE DECREES.

The Circuit Court entered two decrees, by each of which it is claimed it satisfied the mandate of this Court.

The first decree was entered on the 14th day of July, 1879. It vacates the original decree and awards costs. It contains a proviso, recognizing the prior rights of the Denver Company.

And after a recital of the claims made by the two supplemental bills, a provision that no further decree could be given until the Court should be better advised.

That pending such inquiry, both parties be enjoined from changing the *in statu quo*.

A further provision granting liberty to each party to adopt a different line from the one in controversy.

The decree then provides for an inquiry concerning:

1. To what extent two companies would have to occupy the same track.

2. Whether more than one track was possible in the Royal Gorge; whether any track had been constructed therein, and, if so, as to cost thereof.

The inquiry ought to have ended here, but seven more subjects of inquiry are mentioned, with directions how to proceed, take testimony, &c.

The subject matter of these further inquiries reflects the contents of the second supplemental bill, and shows a tendency to anticipate, a disposition to divine how the Denver Company *would act* if it were *allowed to act*, and control its action in advance.

When it is considered that no facts were presented on which the Court could base its action, and from which it could draw conclusions, this course must appear arbitrary.

The second decree (supplemental record, page 6), was entered on January 2, 1880, after a trial on all questions which were supported by facts and allegations of fact, and the result was that the Court dismissed the first supplemental bill, and then determines that the construction of two tracks is practicable everywhere in the defile.

So that the only question as to which this Court directed the Circuit Court to proceed was disposed of.

In the second decree, the Circuit Court blends several suits, though nominally entered in the case between the Cañon City Company and the Denver

Company, remanded to the Supreme Court, its provisions cover a great deal more.

It must be remembered that the Cañon City Company claimed no right to appropriate the public lands beyond the end of the twentieth mile west of Cañon City, from that point westward, however, in different directions, the Pueblo and Arkansas Valley Railroad Company claimed the right to appropriate the public lands, while the Denver Company claimed the same superior right as against both.

That, as a great deal of the lands along the line were public lands, and in difficult territory, the claims of the Pueblo Company and those of the Denver Company conflicted, and both took active measures to secure possession; the Pueblo Company, in advance of filing its map and securing the approval as required by the defile Act of 1875 and the Denver Company relying on the Act of 1872 as amended in 1877. Conflicts ensued, and in August, 1878, the Denver Company brought suit in the United States Circuit Court to enjoin the Pueblo Company from obstructing and interfering, etc., covering all the lines west of the twentieth mile post, which both claimed the right to construct under their respective charters; notably the lines between the twentieth mile post and the South Arkansas and Leadville. While the case was pending, but before answer, the Cañon City Company and the Pueblo Company as alleged became consolidated, and the consolidated company answered the Denver Company's bill, and filed also a cross-bill.

The name of this consolidated company was again that of the Pueblo and Arkansas Valley Railroad Company. While this case (bill and cross bill) was pending undetermined the appeals in the cases between the Denver Company and Cañon City Com-

pany, were decided and remanded, then the consolidated company filed the supplemental bills after mandate and as its supplemental bills after the mandate and its answer and cross-bill in the other case contained substantially the same subject matter, the Court ordered the testimony taken in either of the cases to be read in the other, and the cases themselves were tried together, and, as it appears by the supplemental record, only one decree was entered covering all the cases.

This explanation is offered because without it the decree could not be readily understood, the facts not appearing in the records.

This decree vacated the original decree, but it grants the injunction against the Cañon City Company, or its successor, only *conditionally*, and provides not for the instant dissolution of the injunction pending against the Denver Company, but directs that such dissolution shall only take place if the Denver Company elects to do what?

Pay the Pueblo Company for all the railway it constructed between Cañon City and South Arkansas, whether that railway was constructed to its liking or not; whether or not that railway is on its located line; whether that railway was on the public domain or on private land; in other words, if the Denver Company adopted and paid for a line it had not selected itself.

whether the work was done before or after this Courts decision on appeal,

Now it is submitted that the Denver Company has rights, and one of its rights is to construct a railway along the line it located through that defile; that ought to have been awarded. Under the Supreme Court decision no compensation was required, except for such work as might have been

done in portions of the Royal Gorge, where but one track was possible, and that the Court itself disposes of by declaring two tracks practicable.

It is submitted that when the Pueblo or Cañon City Company expended moneys after the Supreme Court decree, in the hope of success on a new claim, they incurred risks which could easily have been foreseen, and that there is no equity which could compel the Denver Company to reimburse the Pueblo Company for any expenditure, *if made on the former's located line after a reversal.*

It is not denied that in certain cases equity would compel the Denver Company to pay for work done by its antagonist; but when and how could such a case arise? Certainly only after the execution of the mandates. If, then, in exercising its prior and superior right and *choice* of location, the Denver Company shall, for instance, unnecessarily deviate from its line as located in order to benefit by its antagonist's work, then, indeed, would such a case arise, but not till then.

The decree is oppressive:

The Circuit Court actually tries to destroy the Denver Company's right to appeal to this Court from its decision on the question whether, on principles of justice and equity, it ought to pay at all for that which, for all that appears, it might not choose if left to exercise its own discretion. The Denver Company is left the choice between the law's delay on the one hand, and voluntary election, (as the Court commands), on the other. This election, too, must be consummated before it can possess itself f that whereto it has a positive right.

It is submitted this is a very barren recognition of the Denver Company's prior rights, and not such as this Court contemplated should be made.

Attention is further called to pars. I. and XIII. of the decree, and par. 1 and 18 of the conclusions of the Court as entirely unwarranted.

VII.

CONCLUSION

The entire controversy after the mandate has, by reason of the supplemental bills and the "short cuts" in practice, become one dense mass of confusion, a Gordian knot, which this Court should sever with a strong hand.

The Circuit Court should be ordered forthwith to execute the mandate by decreeing that the Denver Company has a prior right because of the earlier grant; that the injunction against it as recited in the mandate is dissolved; that the Cañon City Company or its successor be enjoined from obstructing the Denver Company; that in all other respects the parties should be left to their original remedies for any grievance that may arise in consequence, whether that grievance be in relation to competitive construction or for usurpation by the Denver Company or any other matter.

If this Court deem it proper, the decree might provide the retention of lien for any sum the Denver Company might be decreed to pay, until paid, or the Denver Company be required to give security.

It is now ten years since the Denver Company commenced its struggles at a time when no private

capital took ventures in undertakings of similar character in the far West without the most substantial support of Congress in form of land grants, guarantees, &c., yet with nothing but a right of way, did this concern struggle on through years of depression and stagnation, contributing, perhaps, more than any other similar undertaking to the development of the vast wilderness on the Eastern base of the Rocky Mountains.

It struggled through adversities and litigation until its claims were finally sustained in this Court. On the faith of that decision millions have been raised to undertake the construction of the railway up the main Arkansas river, to Leadville where thousands of people anxiously look forward to its completion, as a guarantee against famine of food and coal.

It is nearly a year since the Supreme Court sent its mandate, and the Denver Company still prays for execution, with the means on hand to proceed with its construction and with but 18 months left to complete its line to Santa Fé.

Theodore F. Holleyed

for Dr R J.

Supreme Court of the United States.

No. October Term, 1879.

EX PARTE

THE DENVER & RIO GRANDE R. R. CO.

PETITIONER FOR MANDAMUS.

SUPPLEMENTAL BRIEF FOR RESPONDENT.

S. BARTLETT,
GEORGE O. SHATTUCK,
of Counsel for Respondent.

Printed by W. H. Moore, 511 Eleventh st.

Supreme Court of the United States.

October Term, 1879.

THE DENVER & RIO GRANDE R. R. CO.

PETITIONERS.

SUPPLEMENTAL BRIEF FOR RESPONDENT.

THE PRESENT ATTITUDE OF THE CAUSE.

On the day set for the hearing of this cause, the Court had before it a Petition for Mandamus founded on an alleged state of the Record and a full and complete return of that record by the Court, to which the mandamus is (if at all) to be issued.

It has been suggested to this Court, that since the filing of this Petition further proceedings, resulting in a decree, have been had in the Court below, which may properly be invoked into the cause, presumably not to interpret the mandate which the Petition seeks to have enforced, but upon the ground that this is a subsequent decree,—and that although in some of the intermediate proceedings a disregard of the mandate shall be shown, as alleged by the Petition, yet, as ultimately shaped, it is a substantial execution of the mandate and renders an inquiry into those proceedings unnecessary.

Without further asking the attention of the Court to the matter of form involved, and its influence upon the preparation of parties to discuss the questions raised by the

Petition, the Respondent cheerfully acquiesces in the proposed course, and will conduct the argument in conformity to it.

But since such acquiescence of the Respondent may not be deemed sufficient ground for departing from the original record, or since the final decree of the Circuit Court may not be held to conform to the mandate, our efforts must be directed to sustain the following propositions:

1st. That the allowance of supplemental or cross-bills by the Circuit Court in this cause after the mandate, was in conformity to the settled rules of Equity proceedure and not repugnant to the doctrines or rules of this Court.

2d. That this final decree of the Circuit Court does not conform in substance or form to the principles established by the judgment and mandate of this Court, in this, that it gives that part of the road constructed by us through the Canon and to South Arkansas to the Denver Company on its paying its cost. (Record of Opinion and Decree of Circuit Court, p. 8, II.)

I.

As to the first point: The views of the Defendant are contained in its original brief, to which we refer.

It may possibly be thought, that since the final decree of the Circuit Court has declared that the alleged facts, on which the supplemental or cross-bills are founded, are not supported by the proofs, or have no such relation to the cause as to affect the decision, it is useless to argue the question of the right to file these bills. But it must be recollected that on appeal, not only this decision as to the weight and character of this evidence in support of the supplemental or cross-bills is to be reviewed, but also the question whether after mandate such bills can be allowed to be filed at all, or under what circumstances.

II.

The pleadings confine the issues in controversy to the road through the Grand Canon and to the mouth of the South Arkansas.

The controversy as to the line between South Arkansas and Leadville is in another suit, which has not come here by appeal.

The substantial questions in this case, divested of any question of pleadings or as to the form of the injunction, are as follows:

1. Is the Cañon City Company, now the Peublo & Arkansas Valley Railroad Company, which has constructed a railroad through the Grand Cañon, and partially constructed an extension to South Arkansas, entitled to retain and use its road?

2. Can the Denver Company take it upon the payment of its value?

3. Can the Denver Company treat the Cañon City Company as a mere wrong doer, and take the road without paying compensation as claimed by the petitioner?

The Pueblo Company, which for convenience will still be called the Cañon City Company, contends that the Act of Congress, of March 3, 1875, as interpreted by this Court, gave to the two Companies "equal and common" rights in the Grand Cañon, that the right of the first occupant was no greater than that of the other, but that, as it was impossible for both parties to construct in some parts of the Cañon at the same time, the prior occupant was allowed to go forward in the exercise of his equal rights, in order that the peace might be preserved, and the common right practically enjoyed, but that this right of prior construcion must be exercised under the direction of a Court of equity and so as to leave if practicable an equally good line to the other party, and that the occupation of neither com-

pany can be disturbed, except for the purpose of securing an equally good line to the other; that any work done is merely an improvement by one tenant in common which he may be allowed by the settled doctrines of Courts of equity to enjoy as if he owned it in severalty, as long as no injustice is done to other tenants in common. It therefore contends, that this petition for a mandamus should be dismissed by this Court with such an interpretation of its former opinion as will secure to the Cañon City Company, the right to use its road, subject to the foregoing limitations.

A. The act of Congress requires that this effect be given to the words "*prior right,*" as used by this Court.

The material part of the act of March 3, 1875, applicable to this case, is as follows:

"That any railroad company whose *right of way,* or whose track or road-bed upon such right of way, passes through any cañon, pass or defile, shall not prevent any other railroad company from the use and occupancy of said cañon, pass or defile, for the purposes of its road *in common* with the road first located." A location under this act in a Cañon could give no exclusive right within its limits.

In the opinion in this case, (99 U. S., 480; Rec., folio 58,) this Court declares that this act was passed for the purpose "of preserving canons, passes and defiles in the public domain for the *equal* and *common* use of all railroad companies."

Now it is clear that this prior right must be consistent with the equal and common right secured by the Statute, and all improvements must be held to be upon the common right and subject to the control of a Court of Equity, so that in future, if other companies appear, they may enjoy the common right.

B. This Court carefully avoided the use of the words

"prior right of way," and clearly intended to extend the prior right no farther than required by the necessity which exists of allowing one party to go forward when there is only room for one, although two may have an equal right to do so.

If one Company has (as the final decree just entered in the Court below declares) an absolute "*prior right of way to select the route for and locate and construct its road,*" the choice may involve, as stated in the petitioner's brief, "*considerations of an enormous value*" which would be utterly inconsistent with the equal and common rights secured by the statute. (Opinion and Decree of Circuit Court, p. 8, II.)

To clearly understand the opinion of this Court, it is necessary to examine the opinion and decree of the Court below. The decree was reversed, because in the opinion of this Court, it could "only be sustained upon the assumption, that the Cañon City Company had by prior occupancy, acquired a right superior to any which the Denver and Rio Grande Railway Co., had to use the Cañon, *for the purpose of constructing its road.*"

It is clear that this Court did not intend to enlarge or diminish this "prior right to construct," recognized by the Court below, but simply to transfer it to the Denver Company. What, then, is this prior right, declared in the opinions and maintained in the decree of the Court below?

Dillon, J., (Record in Cañon city and San Juan Railroad Co. *v.* Denver and Rio Grande Railroad Company, fol. 214, 220, 221,) said: "We have the case of *a concurrent right* in two companies to construct their roads through the cañon, and to use and occupy the cañon for that purpose. * * If a centre line can be drawn through the Cañon one company should be restricted to the space on one side of the line and the other to the space on the other side of the line, if this will allow of the construction of the two lines

of railway in the Cañon and no other course is more equitable. * * If both companies are ready to go forward to construct their roads immediately, one company should not be permitted to adopt a route which will prevent the other Company from an *equal, fair and reasonable use of the cañon.* Equality is equity. * * It may be taken sufficiently to appear as the case stands, that both parties cannot go on with the work of construction at the same time. * * * The San Juan Company as above held on the pleadings as they now stand, has the *prior right of occupation,* and may if it chooses go on with the work of grading and construction," but subject to the control of the Court.

The decree simply gave effect to this opinion. It designated a route which the Canon City Company as the first occupant might go forward and build upon, but it gave that company no absolute right to select. On the contrary, the Denver Company could at any time "exhibit its bill in this or any Court of competent jurisdiction to compel the plaintiff *to adhere to its line aforesáid,* and to so *change the line of its said road* and locate and construct its road at all points so as to *permit the convenient and proper location and construction of defendant's road,* or to compel the plaintiff to permit the defendant to occupy the track and roadway of the plaintiff, if at any point in said defile it shall be impracticable to *conveniently* construct or safely operate two lines of railroad." By the terms of this decree, when it was practicable both companies were allowed to construct at the same time. The company going forward was required to complete within certain limits "*within six months* of the rendition" of the decree.

It must be assumed that the Court below was satisfied that this route, which it designated and required the Cañon City Company to adhere to unless ordered by some Court to change it, would leave a route equally good, convenient and proper for the other Company, or if the Denver Company was dissatisfied by the decree, it could

demand a change in the line designated, to secure to itself such a route.

But the Report of the Commission of Engineers, made since the construction of the road of the Cañon City Company through the Grand Cañon, shows that the Court in its decree did actually leave a line equally good in all respects through the Grand Cañon for the Denver Company. (Record of Opinion and Decree of Circuit Court, p. 13.)

If the Denver Company did not secure an equally good line it was by its own fault in not applying for it.

It is clear that this decree gave to the Canon City Company only an equal right to improve in the Canon, and the only priority was in the time of making the improvement.

Having thus considered the opinion and decree of the court below, the proper interpretation of the opinion of this Court depends largely upon the facts presented to it, and to which it must have supposed that the opinion was applicable. These facts were as follows.

1. The Court knew that both parties were authorized by the decree of the court below to go forward with the work of construction, and it was stated by the Counsel of the Denver Company (Argument of Grant, p. 19,) and assumed by this Court that both companies were constructing roads in the Canon.

2. It was supposed that the Cañon was divided with reference to construction into three parts.

a. In the first division both companies could proceed with construction at the same time without interference.

b. In the second division two roads were practicable, but two companies could not proceed with the construction at the same time.

c. In the third division it was practicable to have only one road-bed or track.

3. Although it was assumed that both companies had

gone on under the decree, it was uncertain how far they had proceeded.

With these facts before it, the language of the opinion is explicit, and its construction easy.

a. The Court said *as to the first division of the Cañon*: "Where the Grand Cañon is broad enough to enable both companies to *proceed* without interference with each other in the construction of their respective roads, they should be allowed to do so." This clearly means that they were to go on as under the decree of the court below, each having under that an equally good line and each being protected from the other, neither having any priority or in any way disturbing the other. This is wholly inconsistent with the idea that either was to have the road of the other.

b. As to the *second division of the Canon*, where two roads could not be built at the same time, but where two equally good lines could be built, this Court said the Court below "*should by proper orders recognize the prior right of the Denver & Rio Grand Railway Company to construct its road.*" There was no intimation that it was to have a better line than the other Company, or more than an equal right in the Canon, or that it was not to proceed under the direction of the Court, but simply that when the lines had been selected or designated by the Court, and neither Company had built, it should have the right to go forward. The commissioners now find that it can now construct as well in all respects as if it had gone forward then. They can even build to better advantage because they can use our track. But as it has abandoned its construction after at first going on under the decree and neglected to enjoy its equal right, and has devoted its energies to an unsuccessful attempt to obtain a monopoly by an appeal to this Court, and the Cañon City Company has diligently prosecuted its work as it was bound to do, having refer-

ence to the public advantage, its own interest, and the requirements of the decree, and is now able to enjoy its equal right, can the Denver Company, which has been actually helped by our construction, be allowed to take our road either with or without compensation, without a plain violation of the statute which was intended to secure equal rights to all companies?

c. The decision of this Court as to what was supposed to be *the third division of the Cañon,* is only important as showing the principles upon which the Court acted, as it is now found that another equally good road can be built in any part of the Cañon at an equal cost. This Court decided that if the Cañon City Company had constructed a road in the part of the Cañon which would admit of only one road bed and track, the cost was to be provided for as the equities of the parties might require. As the Court had already decided that under the Act of Congress the ultimate rights in the Cañon were "equal and common," the cost must be apportioned upon that theory.

This Court did not intend to recognize any prior right where either party had constructed a road.

1. The whole controversy in the Court below, and in this Court, was to determine how the parties should proceed when both parties were ready and were desirous of working at the same place and at the same time.

The opinion of this Court must be construed with reference to that state of things. The attempt to apply language used with this limited purpose to determine the ultimate rights of the parties, has led to all the difficulties in this case. As to ultimate rights, there was no controversy at that time. Both Courts held that the rights were "equal and common." The Court below gave the Cañon City Company the right to proceed first, because they held it to be the first occupant, this Court transferred the right to the Denver Company upon the same ground.

2. The Court said that where there was room for both roads, both companies should proceed to construct, which clearly implies that the possession of the part already constructed was not to be disturbed.

3. The road in the Cañon had been constructed by a tenant in common, under a decree of Court, and the work done could not, therefore, be disturbed without compensation, but as there was not in terms any provision for compensation except where only one road was practicable, it follows that no transfer of possession in the part of the cañon where two roads could be built, was in the mind of the Court.

III.

The Denver Company has no equity in its favor. If it had gone on under the decree of the court below it would, as the Report of the Commission shows, have had a road substantially as good as that now constructed and at equal cost. *It has not been delayed an hour from the first.*

But the Denver Company wanted a monopoly, and came to this Court and claimed an exclusive right under the act of 1872, and presumably abandoned the construction of their line because they thought if their right should be held to be exclusive they could occupy the road which the Cañon City Company was building under the decree without compensation.

This Court decided that the Denver Company had no exclusive right, but that they should have been allowed to go forward as the prior occupants.

In the meantime the Denver Company has failed to secure a road, not because it has been deprived of any substantial right to build one, but because it has relied upon its claim to an exclusive right and has attempted to enforce it; in the mean time "consoling itself possibly with advice that what the opposing party was building on its

ground would, if this Court decided in its favor, save it that much expense and time." (Petitioner's Brief, p. 3.)

IV.

It is of vast importance to have the extent of the prior right to the use of a cañon declared in the opinion of this Court clearly defined. If it is of sufficient force to divest a title to a railroad which has been constructed under a decree of Court, because of a mistake of law or fact in the opinion, it is submitted that it will practically give to one party a greater interest than the other, and defeat the provisions of the act of March 3, 1875. It is well known that upon this theory surveying parties have been scouring Colorado and New Mexico to make prior locations in cañons because *such* a prior right is practically exclusive. But if it is merely a right to go forward with the construction of a road upon a location designated by the Court in such a way as to secure practically an equally good location for the other party, leaving the actual beneficial interest of both parties in the cañon, except in the matter of time, equal, it will enable the courts to give full effect to the act of 1875.

V.

If in violation, as we say, of all the rules which govern Courts of equity in such cases, the Denver Company should be allowed to take the constructed road, it must pay its full value. It is too well settled to require argument, that if a tenant in common makes improvements on the estate in good faith, compensation shall be made if he is deprived of them.

In this case, the improvements were made under a decree of the court below or under the mandate of this Court,

which said in terms that both companies should be allowed to go on where there was room for two roads.

1 Story's Eq., §655.

Hall *v.* Piddock, 6 C. E. Green, 314.

The sum of this whole controversy is this. By the statute there is given to each of the companies a common right in an easement. If either party has attempted to enter upon the enjoyment of that easement in such manner as to preclude or impair the right of the other, a Court of equity will interpose and regulate or alter that mode of enjoyment. If, on the other hand, the enjoyment thus attempted does not substantially impair the rights of another, then a Court of equity will, upon the principle upon which it administers the rights of tenants in common, permit the enjoyment to continue, making compensation, if need be, for any advantages, if any, which may accrue to the party first entering.

Applying this principle to the state of facts as they were supposed to exist when the judgment of this Court was rendered, the Denver Company having by this Court been declared to have entered first upon the construction of its road in the Royal Gorge, where, as then believed and in the pleading of the Rio Grande Company declared, (99 Otto, 468,—Rec., p. 22,) but one track could be laid, that company would be authorized to construct its road through that Gorge subject to the use of its track by the Cañon City Company, under the regulation, if need be, of a Court of equity. Upon that part of the Cañon in which two roads could be built without interference with each other, the Cañon City Company having, in the exercise of its common right and also under the decree of a Court, first entered and constructed its road, it should not be disturbed in the enjoyment of it.

But it being now shown by the report of experts, that two roads, at equal cost and without disadvantage to each

other, can be constructed through the Royal Gorge, the construction effected by the Cañon City Company through that Gorge, should be allowed to be held by that Company, since the point declared by this Court in favor of the Denver Company was based solely on the ground that but one road could be constructed therein, and the Rio Grande having first entered, was entitled to build that road.

S. BARTLETT,
G. O. SHATTUCK,
for the Respondent.

SUPREME COURT OF THE UNITED STATES.

No. October Term, 1879.

EX PARTE

THE DENVER AND RIO GRANDE RAILWAY COMPANY,

PETITIONER FOR MANDAMUS.

BRIEF FOR THE RESPONDENT.

S. BARTLETT,
GEORGE O. SHATTUCK,
of Counsel for Respondent.

United States Supreme Court.

No.

EX PARTE

The Denver and Rio Grande Railway Company,

PETITIONER FOR MANDAMUS.

BRIEF FOR RESPONDENT.

The mandate issued in the causes referred to in the above petition, after providing that the decree in the Circuit Court should be reversed, ordered that the cases be "remanded to the said Circuit Court for further proceedings to be had therein in conformity with the opinion of this court."

An analysis of this opinion shows: —

1. A direction that orders shall be entered as well in the suit in which the Cañon City Company (now the Pueblo Company) is plaintiff, as in that in which the Rio Grande Railroad Company is plaintiff, which entries are to be as follows: —

In the suit in which the Cañon City Company is plaintiff, an order discharging the injunction heretofore granted against the Rio Grande Company.

In the suit in which the Rio Grande Company is plaintiff, an order discharging the former order under which an injunction previously obtained by the plaintiff had been dissolved, and by which its bill was dismissed.

Neither of the orders requires either of the bills to be dismissed, but as will be shown hereafter, they recognize that further proceedings are to be had in each suit.

The record shows (folio 449) that each of these orders has been entered.

2. The opinion proceeds to direct that by "proper entries *in each suit*," the prior right of the Rio Grande Company to occupy the Grand Cañon for the purposes of constructing its road, be recognized, and that the Cañon City Company be enjoined from interfering with or obstructing the Rio Grande Company in such occupancy and use.

3. It next proceeds that in the event that the Cañon City Company shall be shown to have constructed since the decree in the court below a road-bed and track in that portion of the cañon which admits of only one track, the cost thus incurred by it is to be ascertained and provided for in such manner and upon such terms as equity may require.

In what sense the words "Grand Cañon" were used by the court will be discussed hereafter; but it is admitted by us that the portion of the opinion requiring an injunction to be issued, restraining the Cañon City Company from interfering with or obstructing the Rio Grande Company in the occupancy or use of the Grand Cañon for the construction of its road, has not been complied with. But the record shows in justification of this omission that certain bills in the nature of supplemental or cross-bills (the precise character of which will, if necessary, be adverted to hereafter) have been offered by the Pueblo Company, and by leave of the court filed, setting up negotiations, acts and compromises had between the parties pending the appeal in this court, which, if proved, vitally affect the decree that ought to be entered. The bills thus filed on leave will be found on folios 95, 284, 294, of the record.

I.

There is thus raised the following general question:

In case of a mandate from this court reversing or modifying on appeal a decree in equity of an inferior court (and even when such mandate prescribes the exact form of decree

to be entered in such inferior court), is there in the law defining or regulating the powers of this court, or in its rules or practice anything which precludes either party, before final decree shall have been enrolled, from showing in conformity to the settled principles and practice of courts of equity, by supplemental bill, answer, or cross-bill, acts, negotiations or compromises between the parties, occurring pending the appeal, and which, if they had been properly before this court, would have vitally affected its judgment and mandate?

There is a further question, namely: Even if where the peremptory mandate prescribes the form of decree, it should be held that equitable relief upon the principles above stated cannot be had, yet where the judgment and mandate recognize the possible existence of such subsequent acts and conduct of the parties, declare that the rights of the parties by reason thereof "can be asserted by appropriate proceedings," and conclude with this direction, — that "the court will make such further orders as may be necessary to give effect to this opinion"; can such judgment and mandate be held to exclude — does it not authorize — resort to such remedies in the case as are in conformity to the principles and practice of courts of equity?

II.

Before discussing briefly the foregoing questions, it may not be improper to recall to the attention of the court the doctrines of equity procedure in relation to the time and mode of pleading facts material to the judgment, which occur after issue and publication and previous to enrolment of the decree, since, if these doctrines are inapplicable to these cases, the questions above stated become immaterial.

Prior to the statute 15 and 16 Victoria (and the new orders), we think the doctrines, as they stood in England, and as they now stand in this country, may be stated thus: —

1. After the cause is at issue, and after publication, and

even after the hearing, but before decree, such facts may always by leave of the court be shown by *plaintiff* by way of supplemental bill, with perhaps the qualification that the facts must be in respect to the same title as that stated in the original bill.

Story's Eq. Pl., Sects. 337, 333 *in notis*, 339.

If, however, such facts merely enlarge or qualify the rights claimed by plaintiff in his bill, the supplemental bill will undoubtedly be maintained.

Jaques *v.* Hall, 3 Gray, 194, 2 Daniell's Chan., p. 1595.

The recent case, Foulkes *v.* Davis (L. R. 7 Eq. 42), seems to show that a new and additional bill by plaintiff will, under the practice as it now stands in England, be allowed to be filed, setting up a new and distinct title arising subsequent to the filing of the original bill.

2. A *defendant* also may show such new facts, although they constitute a new and different ground of defence, and, as the practice now stands, may do this by a supplemental answer without being compelled, as formerly, to resort to a cross bill.

Stamps *v.* Birmingham Railway, 2 Phillips, 673.

Or such facts may be the subject of a cross bill.

Story's Eq. Pl., Sect. 337*a*.

The case of a release pending an appeal would be an illustration of these rules.

Story's Eq. Pl., Sect. 393.

3. Such we suppose to be the doctrine applicable in equity as to the mode of introducing into a cause, after suit or after hearing, facts material to a decree which have occurred after the cause is at issue.

It remains to find the mode of relief under such circumstances where the cause has been heard and a decree pro-

nounced but such decree has not been enrolled. And it seems to be clearly settled that a supplemental bill by plaintiff may be allowed by the court to bring into the cause the new facts at any time before the decree is enrolled. Such bill is termed a supplemental bill in the nature of a bill of review. Delay in bringing it, where the previous state of the record would admit the earlier introduction of the facts, weighs with the court in granting leave to file such bill, but this is passed upon when the leave to file is granted or refused.

Baker *v.* Whiting, 1 Story's R. 218.
Taylor *v.* Sharpe, 3 P. Wms. 371.
Story's Eq. Pl., Sects. 422–3.

What constitutes the enrolment of a decree in our practice is settled to be the expiration of the term in which such decree is made.

Whiting *v.* the Bank, 13 Peters, 6.
Clapp *v.* Thaxter, 7 Gray, 384.

The bearings of these doctrines will be shown hereafter if the court, following the brief of the petitioner, inquires into the legal character of the bills or proceedings in the cause subsequent to the mandate.

III.

Assuming, then, that, by the above stated principles of equity procedure, acts, compromises or conduct of the parties affecting the judgment that ought to be finally rendered and occurring after and pending an appeal may, by some new auxiliary proceeding, be shown in the case at any time before enrolment of the final decree, we submit that there is nothing to be found in the statutes, or in the rules or practice of this court, which precludes such proceedings after mandate in conformity to the above equitable rules and principles.

We have no occasion to deny or ask any qualification of

the doctrines of this court, contained in the cases cited by the petitioner, and in others upon the subject of the duties of inferior courts in executing or giving effect to its mandates. That doctrine is,

1. "That whatever is before the court and is disposed of, is considered as finally settled."

Ex parte Sibbald, 12 Peters, 492.

2. That the inferior court cannot grant "any further or other relief or review *upon any matter determined on appeal.*"

3. That under the twenty-fourth section of the Judiciary Act (altered by Revised Statutes, Sect. 701), which required this court to give such judgment as the court below should have given, a mandate directing judgment to be entered for the defendant must be entered as final in the lower court, which court cannot, in such case, order a new trial.

These cases establish the rule that whatever is passed upon by the appellate court is passed upon finally and cannot be reviewed in an inferior court, but they do not touch the question whether redress may be had in regard to acts and proceedings of the parties subsequent to the appeal. Indeed, the judgment in 12 Peters, 492, in terms refers to and excepts from its judgment equitable proceedings by bills of review. That the foregoing views are well founded, is, we think, shown by the terms of the judgment delivered by this court, to which reference is to be had by the inferior court in acting on the mandate. That judgment declares (folio 40), "If, since these decrees were entered, the Atchison, Topeka and Sante Fe Railroad Company or the Pueblo and Arkansas Valley Railroad Company have, by valid contract, obtained a controlling interest in the property, rights, and affairs of the Denver and Rio Grande Railroad Company, that interest can be asserted by appropriate proceedings, and will not be affected by anything we may determine upon the issues presented by these appeals," and the judg-

ment further recites (folio 30) that it is averred that "those contracts and agreements were made with the intent and design of ending all controversies, and especially all competitive construction of railroad lines between the Denver Company on the one part and . . . the Pueblo and Arkansas Valley Company on the other part."

To what "appropriate proceedings" does this judgment of the court refer, except proceedings appropriate in an equity suit, where, pending an appeal, contracts and agreements of the description recited by the court have been entered into by the parties?

IV.

There remains the question whether, upon an application for a mandamus to compel the execution of a mandate, where it is clear that the inferior court may, in its discretion, properly allow the filing of new auxiliary processes to bring before that court acts and negotiations between the parties, occurring subsequent to the appeal and affecting the judgment finally to be rendered, this court will scan those auxiliary processes to find if they conform to the rules of equity procedure and are like to be effective; and it is submitted that such questions cannot be tried on motion for a mandamus, but must appropriately come before the court on appeal if the judgment of the inferior court in regard to such processes is to be assailed.

Martin *v.* Hunter's lessee, 1 Wheaton, 354.

This record shows (folio 325) that the petitioner has filed a demurrer to raise the question of the appropriateness of the new auxiliary suits, which demurrer has been overruled. Can the propriety of the decision on that demurrer be again tried here on a mere motion?

The court will see by looking at the grounds of this demurrer that they as well as this petition are founded on the hope that the Pueblo Company may be driven to some new

original proceeding not auxiliary to or connecting itself with the pending suits, and that it may thus be compelled to resort and submit to the jurisdiction of the State tribunals.

V.

But if the features of the new auxiliary bills, brought by the Pueblo Company and sanctioned by the inferior court, will, under this motion, be examined by this court, we submit that the pending auxiliary bills (folios 95, 284, 294) fall completely within the rules of procedure applicable to the position of these causes.

1. Treating the new bills as supplemental to the original bill filed by the Cañon City Company against the Rio Grande Company, they are in no wise inconsistent with the rule that a plaintiff whose title, as set up in his original bill, fails, cannot subsequently acquire a new title and introduce it by way of supplement to his bill; his only course, under such circumstances, being to dismiss his bill and bring a new one, founded on his new title.

The argument of the petitioner rests wholly on the supposed applicability of this rule to the suits in hand.

Now, it is settled, both by the statute of March 3, 1875, and by the judgment of this court, that the two contesting parties have the right in common to use the Grand Cañon for the construction of their respective roads, but that the Rio Grande Company has what is termed a prior right in such occupancy for construction.

The original bill of the Cañon City Company was founded on this right of common occupancy in which it claimed to have priority. The judgment of this court admits the common right, but declares the prior right of occupancy to be in the Rio Grande Company.

The supplemental bill of the Cañon City Company asserts (as stated in the opinion of this court already referred to) that pending the appeals, certain contracts for valuable con-

sideration have been made between the parties, with the effect and intent "of ending the controversies between the two companies, and particularly the interference then existing and growing out of the conflicting claims of said companies to their located lines from Cañon City westward to South Arkansas and Leadville, and that for the purpose aforesaid, the defendant and your orator further agreed that the defendant should abandon the claim to the located line of your orator upon the ground in controversy through the Grand Cañon," etc. (Record, folio 134.)

The supplemental bills of the Cañon City Company therefore are based on this ground, — that for good consideration its right of subordinate use of the Grand Cañon has been by contract enlarged so as to ratify the use already made by that company, and it would seem clear that it rests upon an enlargement or ratification of the rights, a portion of which only could have been vindicated in the original bill. (See L. R. 7 Eq. 42, above cited.)

2. But the character of these auxiliary bills, and whether they are to be deemed supplemental or cross-bills, and as to which suits they are referable, must be adverted to.

We suppose it to be clear that, if treated as supplemental bills, they must be held to violate the rule pertaining to that class of bills, and yet that, if treated as cross-bills, they are appropriate and regular; they will, since they have been allowed by the Court, be deemed to be, under such circumstances, of the latter character, unless, looking at their frame, they lack the necessary features of a cross-bill.

Now, an inspection will show that the new bills contain every feature prescribed for cross-bills, save that they declare the facts to be in supplement. But even this declaration is shown to be inappropriate by the fact that *the relief asked is asked as well in the suit in which the Denver and Rio Grande Company is plaintiff* as *that in which the Cañon City Company is plaintiff* (folio 143). And, further, the amendments to the first bill (folio 284) and also the second bill (folio 298) *are each of them entitled as of the suit in which the*

Denver and Rio Grande Company is plaintiff. Such a bill, therefore, by a defendant must necessarily be a cross-bill. The only distinction between a supplemental bill and a cross-bill in the attitude of these causes is, that one is filed by the plaintiff and the other by the defendant.

VI.

But if the foregoing grounds of resistance to the issuing of any mandamus in this cause were untenable, and if it shall be held that no supplemental or cross bill to bring before the court occurrences subsequent to the appeal can be filed in the court below after a mandate and before the enrolment of the decree required by the mandate, we next submit that the extent and the character of any mandamus, if any is to be issued, cannot properly be of the character sought by this petition.

Both the petition and the brief of the petitioner proceed on the ground that the decree to be entered in pursuance of the mandate should have been that the road constructed by the Cañon City Company under the original order and decree of the Circuit Court, not merely in that part of the cañon called the Royal Gorge, where only one track can be laid, but also that part of such construction which extends through the whole length of the cañon, is mere trespass, and that the Rio Grande Company, so far as such construction interferes with its surveys of 1871–2, or with any alteration it may make of those surveys, may treat the same as a trespass, and use such construction as its own without compensation.

Is such the just construction of the judgment of this court?

First. That judgment declares as to the survey by the Rio Grande Company in 1871–2, that it was a mere preliminary survey, not in itself equivalent to a fixed location of the road and not an appropriation of the way granted (folio 49).

That "although defective in some particulars, and not

equivalent to actual location or appropriation of the way, they were quite as complete and extended as the survey which the Cañon City Company caused to be made in 1877" (folio 56).

"That down to the 19th of April, 1878, the record furnishes no evidence that the Denver Company actually occupied that *defile* for any purpose whatever. On that day, however, . . . it did, by its agents, *occupy the narrow pass of the cañon known as the Royal Gorge* with the avowed intention of constructing its road upon the line of surveys made in 1871–2" (folio 51).

"That these surveys of the Rio Grande Company, in 1871–2, followed by an occupancy of the cañon on the 19th of April, 1878, in advance of the Cañon City Company, for the purpose of constructing its road *through the defile*, was, in our judgment, a final appropriation of the way granted by Congress," and thus it "came into the enjoyment of the beneficial easements granted by Congress" (folio 59).

Now, the judgment having determined that the surveys of 1871–2 were not a location within the Act of 1875; that on the 19th of April, 1878, the Rio Grande Company did, by its agents, "occupy the *narrow pass* of the cañon *known as the Royal Gorge*, in advance of the Cañon City Company," and that this having been "for the purpose of constructing its road *through the defile*," the question arises whether the further statement that follows, namely, that it thus "came into the enjoyment of the beneficial easements granted by Congress," is to be construed as a declaration that the easement thus obtained by actual occupation is confined to the Royal Gorge, or was it designed, contrary to the previous declaration of the judgment, to make the surveys of 1871–2, outside of the Royal Gorge, without any actual occupation, equivalent to a "fixed location" throughout?

We submit that it was not, and that the court had in view merely a conflict between the parties as to the occupation of the Royal Gorge, and that outside of the Royal Gorge the

surveys of 1871–2 were not designed to be declared to be a "fixed location" not to be varied at election, so that such variation did not impair intervening rights.

The above construction of the judgment of this court, though possibly in apparent conflict with some of the terms used in the course of that judgment, is believed to be supported by the following considerations: —

The judgment declares that the entries, surveys and all the acts of the Rio Grande Company prior to April 19, 1878, had conferred on it no right whatsoever, but left Congress free to revoke, in effect, all the proffered rights referred to in previous charter or legislation, and bestow them on all other companies who chose to participate in the use of the cañon.

This consequence to the Rio Grande Company is declared to result from its not having prior to the Act of 1875 made any "fixed location" in any part of the cañon until it made such location April 19, 1878. The judgment next declares that the entry of the Rio Grande on the 19th of April, 1878, in the Royal Gorge and its acts of construction therein, *being in a place through which only one track could be built*, and being as to that locality in advance of the Cañon City Company, was of course exclusive, and in relation to the rights of occupancy for construction such a "fixed location" as the judgment showed to be requisite, as hereinbefore stated. But this entry and location in the Royal Gorge had no exterior effect. It did not revive or give effect to the old preliminary surveys of 1871–2, and make them a "fixed location"; nor did it confer on the Rio Grande Company the right of prior occupancy for construction outside its location in the Royal Gorge, and in places where two or more railways might be constructed, but left the respective rights of the companies in the common easement outside the Gorge to be settled by appropriate proceedings in the Circuit Court, where the facts as they should exist at the time of the decree in relation to occupation and construction could be properly dealt with.

The entry on the Royal Gorge on the 19th of April, 1878, can hardly be deemed to carry back the rights of the Rio Grande Company, by relation to the surveys of 1871 and 1872, of the whole cañon. Such doctrine would give priority to the Cañon City Company, since the record shows that it made preliminary surveys through the cañon in 1877, which this court declares to have been equivalent to those of the Rio Grande Company; and the record further shows an entry and occupation of a part of the cañon by that company, though not of the Royal Gorge, prior to the 20th of April 1878, when the Rio Grande Company took possession of the Royal Gorge.

The foregoing view is also confirmed when reference is had to that part of the judgment which requires compensation to be made to the Cañon City Company for construction merely in that part of the cañon called the Royal Gorge, since the principles upon which that allowance is made would embrace all construction inside or outside of the Royal Gorge which had been authorized by the decree of the Circuit Court.

Second. If our construction, then, of the judgment be true, namely, that it is intended to be confined to the rights of the parties in the Royal Gorge, and was not intended to declare that the surveys of 1871-2 constituted, by reason of that entry and occupation of the Royal Gorge, a fixed location for the twenty-two miles of the cañon not included in the Royal Gorge, then the Rio Grande Company have no right to ask for a mandamus which shall treat the labor and expenses of the construction by the Cañon City Company beyond the limits of the gorge as a trespass, and thus in effect declare the right of the Rio Grande Company to enter upon and enjoy the same without compensation.

Outside the gorge, it will present the case of a mere tenancy in common, where one of the tenants in common had occupied in severalty a portion of the common easements and by the settled principles of law in relation to the rights

of tenants in common, a court of equity never disturbs that separate occupation if it can be maintained without excluding the fair enjoyment by the other tenants of the common premises, but equalizes any advantages obtained by such occupation by pecuniary compensation.

Third. Upon any construction, however, that may be made of the judgment of this court, we submit that an exclusive occupation of a portion of the common premises, under a decree of court entered in a suit between the same parties as to their respective rights in those premises, and labor and expenditures made in conformity to such decree, cannot, either in an appellate court or in the court that entered such decree, upon any equitable principles be disturbed or declared to be the property of the other tenant, unless necessary to prevent a failure of justice, and not even then without compensation.

VII.

Even if the prior right to construct, granted in the Royal Gorge, is held to extend to the whole cañon, there is nothing in the nature of such prior right, as declared in the court below, and recognized by this court, which will warrant the disturbance of the Pueblo and Arkansas Valley Railroad Company in the occupation of the road which it has constructed in the broad part of the Grand Cañon.

A. The rights of these two companies, under the Act of Congress, March 3, 1875, were declared by this court to be "*equal* and *common*," and the prior right to construct was recognized only to preserve the peace while the work was in progress, and to secure practically the enjoyment of the equal rights. It was not a prior right of way, and could have no effective force after either company had constructed its road. It was a prior right to select a location where there was room to build two roads at once, and a prior right to construct where two could not be constructed at the same

time, but both rights were to be subject to the control of a court of equity.

B. This court did not modify the nature of the prior right given in the court below to the Cañon City and San Juan Company, but simply transferred it to the Denver Company, and it is therefore important to look to the opinions and decrees in the court below in order to determine the nature and extent of this prior right.

1. Hallett, J. (Record in Cañon City and San Juan Railroad Company *v.* Denver and Rio Grande Railroad Company, fol. 208), said: "That the Rio Grande Company *may be admitted to the same right of way*, if there is room for two roads in the cañon, seems to be clear, and perhaps that company may be entitled to use the track of the San Juan Company, if there is room for but one road. This last question may be passed for the present, and as to the first, it is only necessary to say that *both companies cannot go on with the work of construction at the same time in a narrow defile, such as the cañon is said to be. To permit it would be to perpetuate the conflicts which we were lately asked to suppress.*"

2. Dillon, J. (same Rec., fol. 214, 220, 221), said: "Assuming . . . that there was no consummated exclusive right in the Denver Company at the time when the Cañon City Company was organized . . . we have the case of a concurrent right in the two rival companies to construct their roads through the cañon, and to use and occupy the cañon for that purpose. . . . If both companies are ready to go forward to construct their roads immediately, *one company should not be permitted to adopt a route which will prevent the other company from an equal, fair and reasonable use of the cañon;* equality is equity." He then said that in some parts of the cañon both roads could not go on with the work of construction at the same time, and that the San Juan Company as above held on the pleadings, as they then stood, had the "*prior right of occu-*

pation, and may, if it chooses, go on with the work of grading."

The decree appealed from is made upon the same principle and is equally explicit, and gives to the prior right no greater force or extent than was necessary to preserve the peace.

While the Cañon City Company was to go forward with the construction, the Denver Company was to be allowed "to construct its line of railroad . . . upon any proper route which it may select *within or without the plaintiff's way or right of way*, provided it do not, in the construction or operation thereof, obstruct or prevent or interfere with the construction or operation of the plaintiff's said road."

The Denver Company also had a right by the terms of the decree to apply to any court of competent jurisdiction to "compel the plaintiff . . . *to so change the line of its said road, and locate and construct its road at all points on the line thereof, so as to permit the convenient and proper location and construction of defendant's road.*" Further than this, the prior right of the Cañon City Company to construct in the Royal Gorge was limited to six months from the date of the decree in the following terms: "The defendant (Denver Company) shall not at any point (upon the same side of the river) attempt to construct its road until the plaintiff shall have completed its road at such place; *provided plaintiff shall complete its road between the limits aforesaid, within six months of the rendition of this decree.*"

These extracts from the decree clearly show (*a*) that the prior right did not give to the company holding it an absolute right to select a location in the cañon, because the other company had a right to apply to any court of competent jurisdiction to change the first location; (*b*), that the prior right did not secure an absolute right to go forward, as the decree limited the time for doing this to six months; (*c*), that no prior right of way, but only a common right of way, was given to the company going forward, because the other

company could select any proper route *within or without such way or right of way*, subject only to such limitations as were required for police purposes.

C. The opinion of this court did not in any way modify the nature of this prior right as established in the court below.

That question was not argued by counsel before this court. The decree of the Circuit Court was reversed upon the single ground that the Denver Company, and not the Cañon City Company, had the prior right *to construct*, and there was no suggestion of error in the decree as to the nature of the prior right.

On the contrary, the part of the decree of the court below which determined the extent of this prior right, and especially that part which had provided equitably for the construction of the two roads in the broad parts of the Grand Cañon, merely allowing the Cañon City Company to go forward with the work upon a location subject to change by the court, in order to secure "a convenient and proper location" for the Denver Company, so far as it had been acted upon, was approved by this court.

1. This is shown by the fact that this court, learning from the statement of the counsel of the Denver Company (printed argument of Grant, p. 19) that both companies had been constructing under the decree, declared that "when the Grand Cañon is broad enough to enable both companies to *proceed* without interference with each other in the construction of their respective roads, *they should be allowed to do so.*"

2. This is shown by the fact, that while an equitable provision was made for the cost incurred in those portions of the cañon which admit of only one road-bed and track, no such provision was made for the cost of constructing the road in the parts of the cañon where two roads could be constructed. As the whole road in the cañon was constructed under a decree of a court of equity, and in the

enjoyment of a right held in common, there was no reason for making the equitable provision in one case that did not exist in the other, if the possession was to be interfered with. The conclusion must be that in the broad parts of the cañon, neither party was to be disturbed in the possession of its road.

3. This court carefully avoided the use of the word "way" or "location" in connection with the words "prior right," and simply declared the prior right to be a right to *construct*. It is obvious that a prior right to construct ceases to have any effective force when either of the parties has constructed its road under the authority of law.

4. All the language of the court is to the effect that the right of way was common.

Record, fol. 68, the Court says, "At the time of the passage of the Act of March 3, 1875, Congress had become convinced of the importance to the country, and particularly to the Western States, of preserving cañons, passes and defiles in the public domain for *the equal and common use* of railroad companies, organized under competent State or Territorial authority, and to which might be granted by national authority the right of way" (fol. 62). "According therefore to the Act of March 3, 1875, the Cañon City Company . . . might for the purposes of its road occupy and use that cañon in common with the Denver Company."

5. In the clause making provision for the cost already incurred in the part of the cañon which admitted of only one road, the court does not suggest any transfer of title, but only a provision "upon such terms and conditions as the equities of the parties may require." As the rights have been declared to be common, the provision must be for the enjoyment of a common right. That this is the view of the Denver Company seems to be shown by the form of decree they propose. (Fol. 484.)

6. Any greater prior right than this could not exist under the Act of 1875 which made the right common.

D. Having thus shown the nature of the prior right to construct which is to be recognized in the decree of the court below, the question remains whether, upon the general principles of equity, it requires or will warrant the disturbance of the possession of the road which has been constructed in the broad part of the canoñ.

1. It is clear that if the Denver Company had constructed its road in the broad part of the cañon, in "the convenient and proper location" which it was entitled to by the decree of the court below, it would have suffered nothing except damage in money, which the other company could have paid *to an extent that should make the beneficial enjoyment of the canoñ equal.*

2. If it has failed to go on, under the decision which the court below gave, the Cañon City Company ought not to suffer for that. This was not a case in which a party could sleep upon his rights. The Cañon City Company has built its road in good faith, under a decree of court; it has undoubtedly issued, or agreed to issue, stock and bonds to raise the money for this purpose; it cannot, without great injustice, be deprived of its title, and it is too well established by courts of equity to admit of doubt that it cannot be disturbed in its possession even with compensation, unless necessary to prevent a failure of justice, and that under no circumstances can it be disturbed without compensation.

The doctrine is clearly stated in 1 Story's Eq., § 655, as follows: "When one tenant in common, supposing himself to be legally entitled to the whole premises, has erected valuable buildings thereon, he will be entitled to an equitable partition of the premises, so as to give him the benefit of the improvements; or, *if that cannot be done*, he will be entitled to a compensation for those improvements."

Hall *v.* Piddock, 6 C. E. Green, 314.
Swan *v.* Swan, 6 Price, 518.
Conklin *v.* Conklin, 3 Sandf. Ch. 65.

E. But we can go one step further, and contend that upon a fair construction of the clause in the opinion which declares that each party may *proceed* with the construction of its road "where the Grand Cañon is broad enough to enable both companies to proceed without interference with each other," the mandate secures to the Pueblo Company its road in that part of the cañon, and as it is now too late to change this mandate the question is settled in favor of the Pueblo Company. This court may well have said that under the equitable terms of the decree of the court below, neither party could suffer any substantial injustice by the construction of the other in that part of the cañon.

F. The court cannot certainly go further than to declare that the road constructed in this part of the cañon shall upon equitable terms, at the election of the Denver Company, be held by the Pueblo Company for the common use, like that in the narrow part.

The power to declare that a road in any part of the cañon shall be for the common use would seem to be necessary, if a third company should locate in a cañon where only two roads can be built; and if the power exists, it may be exercised in this case.

But it is clear that the Pueblo road is entitled to hold the road it has built, or to receive compensation for whatever interest it is compelled to part with. But this petition must be dismissed unless the Pueblo Company is to be treated as a mere trespasser, and to be deprived of its property as a wrong done without compensation.

The doubt as to the interpretation of the mandate arises from the fact that the construction of the road through the cañon by the Pueblo Company, and the failure of the Denver Company to proceed to construct upon the location it had selected after the decree in the court below, has changed the relation of the parties and the state of facts to which it was

supposed that the mandate could apply. This makes it very desirable, in order to avoid further litigation, that the interpretation of the mandate should be settled, even if the court should decide that the writ must be dismissed upon technical grounds.

S. BARTLETT,
GEO. O. SHATTUCK,

For the HONORABLE MOSES HALLETT,
Judge of the Circuit Court of the United States for the District of Colorado.

Supreme Court of the United States.

No. 10 (Original).

Ex-parte: THE DENVER & RIO GRANDE RAILWAY COMPANY, PETITIONERS.

OPINION AND DECREE OF CIRCUIT COURT OF COLORADO AND REPORT OF COMMISSIONERS.

No. 155.	The Pueblo and Arkansas Valley Railroad Company *vs.* The Denver and Rio Grande Railway Company.	Bill and cross-bill and supplemental bill.
No. 154.	The Denver and Rio Grande Railway Company *vs.* E. T. Alling et al.	Bill.
No. 186.	The Denver and Rio Grande Railway Company *vs.* The Pueblo and Arkansas Valley Railroad Company.	Bill and cross-bill.

Conclusions of the Court.

1. Under the decision of the Supreme Court, The Denver and Rio Grande Company has the prior right of way in and through the Grand Cañon of the Arkansas River.

Such right arises out of the prior occupation and appropriation of the way through that cañon by that company in April, 1878.

2. In virtue of such prior occupation and appropriation and the right thus acquired with the avowed purpose of building a road further westward through the valley of the Arkansas River, that company has also the prior right to select and locate its line in and through that valley for some distance in advance of its actual occupation, to be determined by the circumstances of the case. Such right cannot be displaced or defeated by another company locating on the same ground before the Denver and Rio Grande Company proceeding with reasonable diligence should locate its line, although such other company may have acted in good faith.

3. Accordingly the survey and location of a line above and beyond the Grand Cañon, by the Cañon City and San Juan Railway Company or the Pueblo and Arkansas Valley Railway Company, in advance of any location of a line by the Denver and Rio Grande Railway Company, within such reasonable distance from and above the cañon as may appear to be just and equitable under the circumstances of the case, and having reference to the topography of the country, shall not defeat the right of the latter company to occupy the same ground.

4. When this controversy arose in April, 1878, the avowed purpose of the Denver and Rio Grande Company was to construct its main line from Cañon City to South Arkansas, a distance of about

sixty miles, nothing was then said as to the road from South Arkansas to Leadville, which is not of the main line, but in the certificate of incorporation of the Rio Grande Company is called the Western Colorado Railway. So also in the certificate of incorporation of the Cañon City and San Juan Company the road is described as extending from Cañon City to South Arkansas, so that the controversy in its beginning related only to the line between those points.

5. It appears from the report of the commissioners appointed by this court to examine the line, that from Cañon City to South Arkansas, if two roads shall be constructed in the valley of the Arkansas River, they must in general be upon opposite sides of the river. An exception arises in the Grand Cañon, and perhaps at one other point, but the proposition as stated is in general correct. Both companies having located on the north side of the river, and substantially on the same ground, it is fairly to be inferred that the north side is preferable to the south side. There is also in the record testimony to support that view.

6th. From the report of the commissioners and testimony in the record it also appears that from the mouth of the Grand Cañon, westward to South Arkansas, the valley of the Arkansas River may be regarded as a cañon, pass, or defile within the meaning of the act of 1875, by which, according to the decision of the Supreme Court, the rights of both companies are now to be determined. In some places that valley may be a cañon or defile, and in others a pass, but in all places between the points named it should be regarded as within the terms of the act of Congress.

7th. The Cañon City and San Juan Co., or the old Pueblo and Arkansas Valley Co., or the successor of those companies by consolidation, the present Pueblo and Arkansas Valley Co., having built wholly or in part a railway from Cañon City to South Arkansas, on the north side of the river, on the line located by the Denver and Rio Grande Co., the latter Co. is entitled to that railway, subject to the equities to be hereafter stated, unless by negotiations between the parties since the controversy arose the rights of the parties have been changed. For the reason given in the fourth clause of the foregoing proposition, the Denver and Rio Grande Co. has no prior right of location between South Arkansas and Leadville, the Pueblo Co. having first located its line on that part of the route.

8th. In the lease made by the Denver and Rio Grande Co. to the Atchison, Topeka and Santa Fé Co., and the concurring agreements between persons connected with those companies, or with the Pueblo and Arkansas Valley Company, there is no express stipulation or agreement as to the road from Cañon City to Leadville, now under consideration, and any inferences that may be drawn from certain clauses and provisions of those documents when taken and considered by themselves, should be controlled by the following circumstance:

Shortly after the lease and accompanying agreements were drawn up, and before ratification thereof by either of the corporations parties thereto, differences arose between the officers of those corporations respectively, as to the meaning and effect of those documents, in respect to the road from Cañon City to Leadville. With these differences pending and unsettled, each corporation proceeded to ratify the lease, and the Rio Grande Co., by express resolution, declared its purpose to reserve the right of way here in controversy. In the face of that resolution it is impossible to say that the several clauses and specifications in the lease and accompanying agreements on which the Pueblo Company now relies shall have the meaning imputed to them.

9th. That portion of the line extending from Cañon City to the mouth of the Grand Cañon is not regarded as in controversy in these suits.

10th. Mr. Andrews N. Rogers will be appointed a commissioner to ascertain and fix the points at the mouth of the Grand Cañon, and at or near the mouth of the South Arkansas, where the road already built, or partly built, may be connected with another line.

11th. The said commissioner will compute the cost of the road already built, or partly built, between the points last mentioned; of the items designated as "legal" and "miscellaneous," mentioned in the report of the commissioners, such part only shall be taken as forms a part of the cost of the right of way. If the testimony in the record shall not be sufficient to advise the commissioner as to the cost of said road, further testimony shall be taken in that behalf.

12th. As soon as practicable the said commissioner shall report to the court the whole amount of the cost of said road between the points above named as ascertained by him.

13th. Within ten days after the filing of the report of said commissioner, showing the cost of said road between said points, the Denver Company shall declare whether they will take the same and pay the cost thereof. If said company elects to take the road between said points, it will, upon payment therefor, be delivered to them. Notwithstanding such election the Denver Co. may be heard upon exceptions to the report of said commissioner before final payment.

14th. In the event that the Denver Co. shall elect to take and pay for said line, such payment shall be made within sixty days from the date of the approval of said commissioner's report, by a deposit to the credit of the Pueblo and Arkansas Valley Railway Co. of the sum required in some bank in the city of New York, to be named in the decree.

15th. If either Co. shall elect to build another line, distinct from that already built or partly built, over the whole or any part of the route from Cañon City to Leadville, such election shall be declared within thirty days.

16. In either company shall elect to build another line, such line and the road already built or partly built will be put in charge of Mr. Andrews N. Rogers, with authority to superintend and direct the construction thereof, in such manner as to protect, as far as possible, the rights of all parties in interest, and prevent conflict.

17. If another line shall be built in or through the Grand Cañon, it shall be according to the second plan proposed by the commissioners, as a second track parallel with and adjacent to the present road.

18. In the event that another line shall be constructed through the Grand Cañon the court will hereafter determine whether a change of ownership in respect to the lines in that locality is not required for the convenient operation of each, and in that event, the difference in cost will be adjusted as may be necessary to secure the rights of each.

19. In the first and second of these causes, the costs which have accrued since the interlocutory decrees were entered therein, and in the third cause, all the costs will be equally divided between the Denver Company and the Pueblo Company.

(Endorsed:) 155. Circuit Court U. S. Cañon City & San Juan Railway Co. vs. Denver & Rio Grande Railway Co. "Conclusions of court" as to finding and decree. Filed Decr. 31st, A. D. 1879. (Sg'd) Edward F. Bishop, clerk.

A true copy, as filed in my office.

[SEAL.] Teste: EDWARD F. BISHOP, *Clerk.*

In the Circuit Court of the United States, District of Colorado.

CAÑON CITY AND SAN JUAN RAILWAY COMPANY, NOW called the Pueblo and Arkansas Valley Railroad Company,

vs.

THE DENVER AND RIO GRANDE RAILWAY COMPANY.

To the judges of the Circuit Court of the United States for the District of Colorado:

Your petitioner, the Denver and Rio Grande Railway Company, respectfully shows to the court that it heard and has attentively considered the conclusions of the court, announced this morning in this cause, and respectfully protesting against the same in so far as the same declares that your petitioner shall account for and pay to the complainant any sum of money, and especially for all sums expended in constructing the railroad involved in the pleadings and evidence in this cause, and more especially for all expenditures other than those incurred on that portion of the line through the Royal Gorge, a distance of about six thousand feet, as stated in the verified petition of the Pueblo and Arkansas Valley Railroad Company, by William B. Strong, general manager, filed in this cause June 22d, 1879.

Your petitioner protests that the embarrassments in which it is now involved, as shown in the conclusions of the court above referred to, have not been occasioned by any default or misprision of your petitioner, and that they have been solely occasioned by errors of others, of which your petitioner does not affect to complain, yet your petitioner cannot conceal from itself the magnitude of its misfortune, and now apprehends that unless it promptly offers to comply with the requirements which the opinion of the court contemplates will be ultimately imposed, it will find itself involved in intricacies out of which it cannot extricate itself, resulting in being decreed out of its rights and prevented from constructing its road, which it now is, and ever since the commencement of this suit has been, ready to do.

Therefore your petitioner proposes—

1st. To give bond, with ample security, to pay whatever sum may finally be decreed to be paid by it in such manner as the court may decree; or,

2d. To deposit, 1st, the cost of the construction of the road through the Royal Gorge, as aforesaid, as stated by the said Pueblo and Arkansas Valley Railroad Company in its supplemental bill No. 2, filed in this cause June 26th, 1879; or, 2d, to deposit the whole amount expended, as stated in said supplemental bill, or, 3d, to deposit such other and further sum as this court may require to be deposited (and in this connection your petitioner refers to the report of the engineers, on file in this cause, wherein they state there has been expended between Cañon City and South Arkansas $730,221.89, which includes the items "miscellaneous" and "legal" therein specified, and excludes certain interest therein also specified, leaving the net amount $761,127.08), to the end that your petitioner may be forthwith let into the possession of its property in litigation in this cause.

3rd. The bond to be executed or the deposit made to be under the control and direction of the court and subject to final decree in this cause; but if, upon final decree your petitioner shall appeal to the Supreme Court and obtain supersedeas, according to law, against the execution of the decree of this court, then the deposit to be surrendered with the bond to your petitioner.

Your petitioner well hopes that your honors will, by apt decree, provide for the immediate restoration to your petitioner of the property in controversy, and that by either adopting the one or the other of the modes above suggested, or some other equally available to your petitioner, its prayer may be granted.

LYMAN K. BASS,
Solicitor of the Denver and Rio Grande Railway Company.

J. P. USHER,
E. L. SMITH,
Of counsel.

Dated December 31, 1879.

(Endorsed :) 155. U. S. Cir. Court, Dist. of Colo. C. C. & S. J. R. W. Co., now called P. & A. V. R. R. Co. vs. D. & R. G. R. W. Co. Petition for leave to pay moneys and have immediate possession of road. Filed Jan. 2, 1880. (Signed) Edward F. Bishop, clerk. L. K. Bass, solicitor for D. & R. G. Ry. Co.

A true copy, as filed in my office.
[SEAL.] Teste: EDWARD F. BISHOP, *Clerk.*

In the Circuit Court of the United States, District of Colorado.

PUEBLO AND ARKANSAS VALLEY RAILROAD COMPANY
against
THE DENVER AND RIO GRANDE RAILWAY COMPANY.

To the hon. judges of the United States Court:

The Pueblo and Arkansas Valley Railroad Company, by the undersigned, submits the following objections to the course proposed by petitioner, the Denver and Rio Grande Railway Company.

1st. The course proposed would preclude it from taking an appeal from that portion of the decree that adjudges the constructed road of defendants to be turned over to the other party on compensation and obtaining a supersedeas, as it legally might do, and retaining the possession of same on sufficient bond and indemnity.

2nd. The property of this company would, according to the prayer of petitioner, be delivered to petitioner without any compensation to the company whatever; and the money or bond deposited in its place be left to be decided by future litigation, while the petitioner would have the use of the property to the exclusion of its owner; it would be in effect the transfer of the property without any compensation whatever.

3rd. Even in case the Pueblo and Arkansas Valley Railroad Company should receive compensation for the money expended, and should appeal from that part of the decree above named, we submit that the Denver and Rio Grande should enter into a bond of indemnity to secure it for the use of its road in case a final decree should award the road to it.

4th. The amount of money proposed to be deposited is not the amount found, by the commissioners of this court, to have been expended, but an amount expended long prior to that time.

5th. As far as the bond proposed is concerned, or the payment of money at a future time upon a contingency, we submit that the court cannot legally take property of one and transfer to another upon time and without compensation.

6th. The course proposed and delivery of the road to the other party absolutely, under the circumstances would be, when the physical characteristics of the route are considered, an utter exclusion of the Pueblo and Arkansas Valley Company from the use of the cañon for the purpose of constructing another line, contrary to the

law of Congress giving it a right in common, and would prevent it from using the value of its constructed road, and also prevent it from constructing a line of road connecting the two ends decreed to be its property, until such time as the Supreme Court of the United States should finally decide the rights of the parties, and would, in effect, compel it to abandon the construction of its line; which we respectfully submit is the manifest intention of petitioner.

Respectfully submitted,

(Signed) L. S. DIXON,
G. B. REED,
For P. and A. V. R. R. Co.

(Endorsed:) 155. Circuit Ct. U. S. The Pueblo and Arkansas Valley Railroad Co. vs. The Denver and Rio Grande Railroad Company. Objections to petition for leave to pay money and for possession. Filed January 2, 1880. (Signed) Edward F. Bishop, clerk. L. S. Dixon, G. B. Reed, for P and A. V. R. R. Co.

A true copy, as filed in my office.
[SEAL.] Teste: EDWARD F. BISHOP, *Clerk.*

In the Circuit Court of the United States for the District of Colorado. October Term, A. D. 1879.

THE CAÑON CITY AND SAN JUAN RAILWAY Company *vs.* THE DENVER AND RIO GRANDE RAILWAY Company.	No. 155. Bill and Cross-Bill.
THE PUEBLO AND ARKANSAS VALLEY RAILroad Company *vs.* THE DENVER AND RIO GRANDE RAILWAY Company.	Supplemental Bill in the above-entitled cause.
THE DENVER AND RIO GRANDE RAILWAY Company *vs.* EBENEZER T. ALLING AND OTHERS.	Bill. No. —.
THE DENVER AND RIO GRANDE RAILWAY Company *vs.* THE PUEBLO AND ARKANSAS VALLEY RAILroad Company.	Bill and Cross-Bill. No. 186.

These causes coming on now for final decision upon the submission heretofore made, and having been heard and submitted together, and the court being sufficiently advised in the premises doth order, adjudge, and decree as hereinafter stated.

This decree shall be entered in the first of the above-entitled causes, and comprehending all matters in issue in any of the said causes, shall stand as and for a final decree in each and all in so far as the several matters herein adjudged and decreed shall be found to be in issue in any or in all of the said causes.

The first supplemental bill filed May 24th, 1879, by the Pueblo and Arkansas Valley Railroad Company, shall be, and the same is hereby dismissed at the costs of the complainant therein; said costs to include all costs in *in* support and defence of said bill, to be taxed.

I.

That from the mouth of the Grand Cañon to the mouth of the South Arkansas River, the Denver and Rio Grande Railway Company has the prior right of way to select the route for and locate and construct its road; and that by its entry into the Grand Cañon and occupation thereof in the month of April, 1878, it had secured the right to locate its line in the said cañon and thence westward to the mouth of the South Arkansas River.

II.

That the Denver and Rio Grande Railway Company is entitled to the road constructed and partly constructed by and now in the possession of the Pueblo and Arkansas Valley Company, between the points above named, if it shall elect to take and make payment for the same, as hereinafter provided; and the decree of this court of August 24th, 1878, as set out in the mandate of the supreme court, is hereby set aside and held for naught; and in accordance with the direction of the mandate of the supreme court, it is ordered, adjudged, and decreed that the Denver and Rio Grande Railway Company has the prior right to occupy and use the Grand Cañon of the Arkansas River in the pleadings in these causes mentioned, for the purpose of constructing its railroad therein; and when the said Denver and Rio Grande Railway Company shall have made payment to the satisfaction of the Pueblo and Arkansas Valley Company, or of this court, for the above-mentioned constructed and partly constructed road, then and thereupon all injunctions and restraining orders heretofore made in either of these causes against the Denver and Rio Grande Railway Company shall be dissolved and set aside, and the Pueblo and Arkansas Valley Company, its officers, agents, and servants, shall thereupon and thencefoward be perpetually enjoined from interfering with or in any wise obstructing the Denver and Rio Grande Railway Company in the location, construction, and use of its railroad upon the line aforesaid.

III.

That as to that part of the line from the mouth of the South Arkansas River to Leadville, in the pleadings herein, the court does find, order, adjudge, and decree that the prior right of way upon

said line is in the Pueblo and Arkansas Valley Railroad Company, by reason of its having first located its line on that part of the route, which right of way is hereby confirmed to said Pueblo and Arkansas Valley Railroad Company.

IV.

It is further, ordered, adjudged, and decreed that either of said companies may elect to build another railroad distinct from that already built, or partly built, between the points aforesaid.

V.

That Andrews N. Rogers, esq., of Central City, in this state, be, and he is hereby, appointed a commissioner of this court for the following purposes, viz:

1st. To ascertain and fix the points at the mouth of the Grand Cañon, and at or near the mouth of the South Arkansas River, where the road already built or partly built, may be connected with another line.

2nd. To compute the cost of the road already built, or partly built, between the points last mentioned. In making such computation of the items designated as "legal" and "miscellaneous," mentioned in the report of the commissioner, such part only shall be taken as forms a part of the cost of the right of way. If the testimony in the record shall not be sufficient to advise the commissioner as to the cost of said road, further testimony shall be taken in that behalf, as he may direct. If said commissioner shall desire to take further testimony, he shall report the fact to the court, and thereupon an examiner will be appointed for the purpose of taking the same, and the said examiner when appointed shall be, and is hereby, empowered and authorized to administer oaths to witnesses testifying before him, and in all his actings and doings herein he shall be governed by and conform to the rules and practice of this court relating to masters in chancery, so far as applicable. The said commissioner shall, upon request of either party, report the cost incurred in the construction of said railroad in sections or divisions, as by the said parties or either of them may be required, and one division thereof may be of what is known as the Royal Gorge; and he shall also report upon like request the time or times when the outlay or cost was incurred. The points hereinbefore mentioned to be fixed by said commissioner shall be at such places as will enable the road in question to be connected with facility with extensions to or from said points with economy and security in operating the same as a continuous line. Said commissioner shall make his report to this court as soon as practicable.

3rd. In case either party shall elect to build a new or second line of road between the points above named, that is, between the mouth of the Grand Cañon and the mouth of the South Arkansas River, and between the mouth of the South Arkansas River and Leadville, the

said commissioner shall supervise and control such construction at all points where the two lines come so nearly together as to lead to conflict or dispute between the two companies, and he shall have power at all such points to control the location, construction, and operation of both lines.

4th. Before entering upon the discharge of his duties the said commissioner shall be sworn faithfully to perform the same, and he shall receive such compensation as the court may hereafter allow.

VI.

That upon the filing of the report by the commissioner the clerk of this court shall notify the parties respectively of the fact of such filing, and within ten days from the filing of such report the Denver and Rio Grande Railway Company shall elect whether or not it will take the completed and partially completed road of the Pueblo and Arkansas Valley Railroad Company between the mouth of the Grand Cañon and the mouth of the South Arkansas River and make payment therefor; such election to be in writing and filed with the clerk of this court.

VII.

In case the Denver and Rio Grande Railway Company shall elect to take such constructed and partly constructed road, it shall, within 60 days from the date of the filing of the commissioner's report, deposit in the Chemical National Bank of the city of New York, to the credit of the clerk of this court, the sum specified in such report, and thereupon the constructed and partly constructed road between the points aforesaid shall be delivered over to the said Denver and Rio Grande Railway Company, and upon the approval of the said commissioner's report, the sum named therein shall be paid to the said Pueblo and Arkansas Valley Railroad Company,

VIII.

That the right of the Denver and Rio Grande Railway Company to enter upon the right of way of the Pueblo and Arkansas Valley Railroad Company between the mouth of the South Arkansas and Leadville, and to build another line of road between these points, in such manner as not unnecessarily to interfere with the convenient and useful operation of the Pueblo and Arkansas Valley Railroad Company's road, and under the conditions hereinbefore set forth, is hereby recognized and affirmed.

IX.

In case either party hereto shall determine to construct a second line or line of road, as hereinbefore provided, it shall, within thirty days from the date hereof, file a written notice to that effect with the clerk of this court.

X.

The filing of the election by the said Denver and Rio Grande Railway Company to take the constructed and partly constructed road, and the payment of the money for the same shall not preclude the Denver and Rio Grande Company from excepting to the report of the commissioner as to the value of said road, but the same may be excepted to as if such act had not been done, and the Pueblo and Arkansas Valley Railroad Company shall have the same right to except to such report, notwithstanding its acceptance of the purchase-money.

XI.

The costs of this suit, except as hereinbefore provided, shall be divided, and paid equally by the parties hereto, and in default of payment, execution shall issue therefore.

XII.

If another line shall be built in or through the Grand Cañon, it shall be according to the second plan proposed by the commissioners in their report on file in this case, as a second track parallel and adjacent to the present road.

XIII.

In the event of the building of a second line through the said Grand Cañon the court will hereafter determine whether a change of ownership in respect to the lines in that locality is not required for the convenient operation of each. In that event the difference in cost will be adjusted, as may be necessary to secure the rights of each.

(Signed) MOSES HALLET.

(Endorsed:) Nos. 154, 155, 186. Circuit Court U. S. The Cañon City and San Juan Railway Co. vs. The Denver and Rio Grande Railway Co. Decree. Filed Jan. 2, 1880. (Signed) Edward F. Bishop, clerk.

A true copy as filed in my office.

[SEAL.] Teste: EDWARD F. BISHOP, *Clerk.*

In the Circuit Court of the U. S. for the District of Colorado.

DISTRICT OF COLORADO, *ss.*

I, Edward F. Bishop, clerk of said court, do hereby certify that the foregoing copies of four (4) papers writings are copies of all the paper writings filed in the cause therein stated, from the 29th day of December, A. D. 1879, to the 2d day of January, A. D. 1880, both inclusive.

In testimony to the above I do hereby sign my name and affix the seal of said court, at Denver, in said district, this 3d day of January, A. D. 1880.

[SEAL.] EDWARD F. BISHOP, *Clerk.*

These papers will be filed with the clerk of the Supreme Court of the United States in the matter of the mandamus.

GEO. W. McCRARY,
Circuit Judge.

Jany. 3d, 1880.

To the District Court of the United States for the District of Colorado. Hon. Moses Hallett, presiding.

We, the undersigned, having been duly appointed commissioners to advise the court of and concerning the cost and value of the railway constructed wholly or in part by the Cañon City and San Juan Railway Company, or by the Pueblo and Arkansas Valley Railroad Company, from Cañon City to the twentieth mile post, and of the several matters mentioned in the decree of the court number one hundred and fifty-five (155), entitled "Intermediate Decree on Mandate Supreme Court," having duly qualified, and having carefully examined the said railway and the surveys thereof, and the cañons and defiles of the Arkansas River, through which it passes, and having heard the testimony as required by said decree, now therefore report as follows:

Your commission considers that the road from Cañon City to the twentieth mile post has been built with ordinary good judgment and economy, and its cost as a whole and in sections and subdivisions, exclusive of portions of the items denominated "Legal" and "Miscellaneous," which are of an unusual character, and such as do not commonly occur in the construction of a railroad, may therefore be taken as a measure of its value at the time of construction, errors in accounting being excepted.

In respect to the items making up the aggregate sum of $118,951.20 claimed for interest, the advance of prices and unadjusted claims of contractors appearing as a detached charge, is difficult of distribution according to the subdivisions made and required. The commissioners find it impossible to dispose of the same in a manner satisfactory to themselves and just to the parties, without delay and further testimony. They respectfully submit the same as it occurs in the statement, with the following comments:

Interest on cost of construction is considered a legitimate charge, and should be allowed and distributed ratably, according to the various subdivisions made.

The claim of McCarthy & Homan, if it rightfully becomes a charge against the company under the conditions of the contract had with the parties, covering this ground with a large section of the road in one contract, it is a claim rightfully chargeable to the road when it shall be adjusted with the contractors, and its distribution should be made accordingly.

As to the advance claimed in the price of work, the commissioners cannot from any evidence before them determine what would be equitable, and cannot assume, therefore, to either allow or disallow the claim.

The charge for advance in value of materials seems to be just and should be allowed; its distribution should be made accordingly.

The construction of a railroad through the Grand Cañon of the Arkansas River, on the south side of the river, that would be independent of the one already built through said cañon on the north side of the river, and which would not interfere with it, is impracticable at any reasonable cost. In the consideration of the questions submitted, several methods of constructing a second railroad from Cañon City to the twentieth mile post have been studied, which are here presented in the order of cost, commencing with the least expensive plan, viz:

First. A second road can be built which shall be independent of the constructed line from Cañon City to station 185 of this line, at about the same cost as that of the road already built. From station 185 to station 591 of the constructed line, at the head of the Grand Cañon, about 7 68-100 miles, the constructed road may be used in common by two or more companies; and its capacity is ample for carrying all the business over this distance that can reasonably be anticipated. At station 591 a second road can leave the one already built, and cross to the south side of the Arkansas River, and continue on the south side to a point opposite the 20th mile post.

Second. The second road can be built as in plan first, from Cañon City to station 185 of the constructed line a second track can be built on the same right-of-way and adjoining the road already built, from the entrance to the Grand Cañon at station 185 to station 557+50, at a cost not exceeding that of the constructed line, this track being at all points at a sufficient distance from that of the constructed road, to prevent any interference in the operation of the two roads when completed; providing, that the constructed road can be so controlled as to facilitate the building of the second track, and permit such slight changes in the alignment of the constructed road as the correct and economical construction of the second track may require. At station 557+50 the second road would cross the Arkansas River to the south side, and continue on the south side to a point opposite the 20th mile post, or the double-tracking may be continued to station 591 at the head of the Grand Cañon.

Third. A second road can be built, leaving the constructed line between stations 185 and 190, crossing to the south side of the Arkansas River and continuing on the south side to a point near station 341+70 of the constructed line, about 2.97 miles, where it should cross to the north side of the river and unite with the existing road at station 341+70. From this point to station 557+50, about 4.09 miles, the two companies can use the constructed road in common. At station 557+50 the second track should cross to the south side of the river, and continue on the south side to a point opposite the twentieth mile post, about 9.45 miles. In this case it

may be necessary that the two roads shall occupy the same right-of-way from station 170 to station 190, about 375-1000 mile, and at points between stations 190 and 341+70. The cost of the second road from station 185 to station 341+70, including the two bridges across the Arkansas River required, will exceed that of the road already built on the north side of the river between those points by about thirty per cent. The road may be double-tracked from station 341+70 to station 557+50.

This double-tracking will be through the most difficult part of the cañon, and will cost, including the reconstruction of the Royal Gorge bridge, or the construction of a tunnel to carry the second track by it, about eight per cent. more than the cost of the constructed line between the same points, providing the constructed road can be controlled as stated in plan second.

Your commission, therefore, answers the interrogatories submitted, as follows, viz:

Answer to first interrogatory:

In constructing two roads from Cañon City to the 20th mile post, they must occupy the same track, according to the first plan, herewith presented, from the entrance to the Grand Cañon at station 185 of the constructed line to the head of the cañon at station 591. According to plan second, herewith presented, they need not occupy the same track at any point.

According to plan three, herewith presented, they must occupy the same track from station 341+70 to station 557+50, a distance of about 4.09 miles, unless the road between these points is double-tracked, in which case the two roads need not occupy the same track at any point.

Answer to second interrogatory:

The Grand Cañon of the Arkansas River is not broad enough to enable both companies to proceed without interference with each other in the construction of their respective roads. One railroad is already constructed through the Grand Cañon of the Arkansas River, and this road will interfere with and render impracticable the construction of a second road, except as is described and set forth in the several plans herewith presented. In the narrow portion of the cañon, from station 341+70 to station 557+50, it is impracticable to construct a second line, except by double-tracking. A railroad has already been built through this portion of the cañon, the cost of which is shown by the statement of the chief engineer, A. A. Robinson, submitted in the testimony taken before the examiner, and marked Exhibit "E," and Statement "H," explanatory of Exhibit "E."

Answer to third interrogatory:

The answer to this interrogatory is given in the plans herewith presented.

Answer to fourth interrogatory:

The Cañon City and San Juan Railway Company, or the Pueblo

and Arkansas Valley Railroad Company, have constructed a railroad complete from Cañon City to the twentieth mile post.

Answer to fifth interrogatory:

The line so constructed is located on the north bank of the Arkansas River, and, in general, follows its windings.

Answer to sixth interrogatory:

From Cañon City to station 185 the line is below the Grand Cañon of the Arkansas River, and on this part of the line there is space for another line to be constructed at about the same cost as that of the road which has already been built.

Answer to seventh interrogatory:

The cost of the line from Cañon City to the twentieth mile post, as a whole, is shown by the statements of A. A. Robinson, contained in the testimony taken before the examiner, and marked Exhibit "E," and Statement "H," explanatory of Exhibit "E;" and this is a fair measure of its reasonable value, with the explanation heretofore given. The cost of the same, in sections and subdivisions, is also shown in the statement of A. A. Robinson, chief engineer, contained in the testimony taken before the examiner, and marked Exhibit "—;" and its value, in such sections and subdivisions, is fairly shown by such cost, with the explanation above referred to, in the case of the total value of the line from Cañon City to the twentieth mile post.

Answer to eighth interrogatory:

The parts of the line so constructed which are upon the public domain, those which are on lands owned by individuals, and those on lands owned by corporations, are shown, on the statement of A. A. Robinson, chief engineer, contained in the testimony taken before the examiner, and marked "D," Exhibit "E," with the explanation referred to in answer to interrogatory seventh.

Answer to ninth interrogatory:

The value of those parts that are on the public domain, and of those parts which are on lands owned by individuals or corporations, is shown on the statements of A. A. Robinson, chief engineer, contained in the testimony taken before the examiner, and marked Schedule "D" of Exhibit "E," with the same explanations as those referred to in answer to interrogatory seventh.

All of which is most respectfully submitted.

WILLIAM SOOY SMITH.
GEORGE E. GRAY.
ANDREWS N. ROGERS.

Sworn and subscribed to before me, this 16th day of September, A. D. 1879.

ARCHIE C. FISK,
[SEAL.] *Clerk Dist Court Arapahoe Co., Colo.*

DISTRICT AND STATE OF NEBRASKA, } ss.
COUNTY OF DOUGLAS. }

William Sooy Smith, being first duly sworn, on oath deposes and says that he is one of the commissioners heretofore appointed by

the Circuit Court of the United State for the District of Colorado, to report of and concerning certain matters and things growing out of a controversy between the Denver and Rio Grande Railway Company and others, touching the right of way for a railroad on the Arkansas River; that the above and foregoing report is truly made according to such appointment, and that the facts, matters, and things therein stated are true and correct, as made and determined by this affiant and his associates, according to the best of his skill and ability. WILLIAM SOOY SMITH.

Subscribed in my presence, and sworn to before me, this 26th day of September, 1879. WATSON B. SMITH,

[SEAL.] *Clerk Circuit Court of U. S. for Dist. of Nebraska.*

DISTRICT AND STATE OF CALIFORNIA, } ss.
CITY AND COUNTY OF SAN FRANCISCO. }

George E. Gray, being first duly sworn, on oath deposes and says that he is one of the commissioners heretofore appointed by the Circuit Court of the United States for the District of Colorado, to report of and concerning certain matters and things growing out of a controversy between the Denver and Rio Grande Railway Company and others, touching the right of way for a railroad on the Arkansas River; that the above and foregoing report is truly made according to such appointment, and that the facts, matters, and things therein stated are true and correct, as made and determined by this affiant and his associates, according to the best of his skill and ability. GEORGE E. GRAY.

Subscribed and sworn to before me, at San Francisco, in said State of California, this third day of October, A. D. 1879.

SOUTHARD HOFFMAN,

[SEAL.] *Clerk U. S. District Court District of California.*

DISTRICT OF COLORADO, } ss.
COUNTY OF ARAPAHOE. }

Andrews N. Rogers, being first duly sworn, on oath deposes and says that he is one of the commissioners heretofore appointed by the Circuit Court of the United States for the District of Colorado, to report of and concerning certain matters and things growing out of a controversy between the Denver and Rio Grande Railway Company and others, touching the right of way for a railroad on the Arkansas River; that the above and foregoing report is truly made according to such appointment, and that the facts, matters, and things therein stated are true and correct, as made and determined by this affiant and his associates, according to the best of his skill and ability. ANDREWS N. ROGERS.

Subscribed and sworn to before me, at Denver, in said district and county, this eighth day of October, A. D. 1879.

EDWARD F. BISHOP,

[SEAL.] *Clerk Circuit Court of U. S. District of Colorado.*

To the Circuit Court of the United States for the District of Colorado. Hon. Moses Hallet, presiding.

We, the undersigned, having been duly appointed commissioners to advise the court of and concerning the cost and value of the railway constructed wholly or in part by the Cañon City and San Juan Railway Company, or by the Pueblo and Arkansas Valley Railroad Company, from the twentieth mile post westward to Leadville, and of the several matters mentioned in the decree of the court, No. 186, entitled "intermediate decree," having duly qualified, and having carefully examined the said line of railway and the surveys of the same, and the cañons and defiles of the Arkansas River, through which it passes, and having heard the testimony, as required by said decree, now, therefore, report as follows:

Your commission consider that the road from the twentieth mile post to Leadville, so far as it is in part constructed, has been built with ordinary good judgment and economy, and its cost as a whole and in sections and subdivisions, exclusive of a portion of the items denominated "Legal" and "Miscellaneous," which are of an unusual character, and such as do not commonly occur in the construction of a railroad, may, therefore, be taken as a fair measure of its value at the time of its construction, errors in accounting, if any, being excepted.

In respect to the items, making up the aggregate sum of $118,951.20, claimed for interest, advance of prices, and unadjusted claims of contractors, appearing as a detached charge, is difficult of distribution, according to the subdivisions made and required, the commissioners find it impossible to dispose of the same in a manner satisfactory to themselves and just to the parties, without delay and further testimony.

We respectfully submit the same, as it occurs in the statement, with the following comments: Interest on cost of construction is considered a legitimate charge and should be allowed and distributed ratably according to the various subdivisions made.

The claim of McCarthy & Homan, if it rightfully becomes a charge against the company under the conditions of the contract had with the parties covering the ground, with a large section of the road in one contract, it is a claim rightfully chargeable to the road when it shall be adjusted with the contractor, and its distribution should be made accordingly.

As to the advance claimed in the price of work, the commissioners cannot, from any evidence before them, determine what would be equitable and cannot assume therefor, to either allow or disallow the claim.

The charge for advance in value of materials seems to be just and should be allowed; its distribution should be made accordingly.

Your commissioners, therefore, answer the interrogations submitted as follows:

Answer to first interrogatory:

For constructing two roads from the twentieth mile post to Leadville, it is not necessary that they should occupy any portion of the track in common.

Second. The cañons on said route are broad enough to enable both companies to proceed without interference with each other in the construction of their respective roads, except that the second line must occupy the same right-of-way at many points with the one already constructed, and the line of the latter road will have to be moved slightly at points where the two roads will be on the same side of the river, and where the space between rocky points and the river is not sufficient for the two tracks without such change in the alignment as to permit the construction of the second road without excessive cost, unless the line of the first road is so changed.

One road has been partly constructed through all the cañons of the Arkansas River between the twentieth mile post and Leadville, and this road will only interferfere with the construction of a second line as above stated.

In the narrow portions of said cañons there are no places where the construction of a second line is impracticable.

Answer to third interrogatory:

If two roads shall be built on the same route from the twentieth mile post to Leadville, the commissioners are of the opinion that for the most part the natural choice of ground for the second road would be on the opposite side of the river from the present constructed line. Yet, at places it is apparent that by rigid adherence to this plan the line would be unduly lengthened by following the windings of the river. Notably this would be the case between Cleora and the lower end of Brown's Cañon.

It would seem expedient, therefore, that the company building a second road should be able to select the most available ground for its line on either side of the river, when this may be done without unnecessary interference or encroachment upon the right-of-way of the present constructed line.

Through Brown's Cañon, the lines should be separated by the river, and at the head of the cañon the second line may make an under-grade crossing which will secure a free choice of ground upon either side of the river for a long distance above.

At a point immediately above the second crossing of the river, by the constructed road, near what is known as "Shipka Pass," and along a portion of the 86th mile from Cañon City, the lines will probably be brought into close relation upon the north side of the river, occupying a common right-of-way, and the construction would be in the nature of a double-track road.

Thence the lines may be separated, though running parallel upon the north side of the river up to the next crossing, it being at the commencement of the ninetieth mile.

Thence the second line may take either side of the river without conflict of lines for some miles, but it should occupy the north side of the river through Pine Creek Cañon recrossing the river, and the constructed line by an over-grade crossing at about station 5,055 of the constructed road, on the ninety-seventh mile.

Thence the second line will continue on the south side of both the river and the constructed line to the commencement of the one hundred and eleventh mile, where it will naturally cross to the north side of the river, and so continue for the remainder of the distance to the mouth of the California Gulch.

No serious conflict of lines is necessary for this upper portion of the route, though it is apparent that the same right-of-way must be used in common in the vicinity of the 104th mile, subject to the same comment as made for the 86th mile.

In the judgment of the commission the relative cost of the two lines thus indicated from the twentieth mile post to Leadville, will not materially differ.

The general location of a second road as herein indicated, is not designed to be definite or conclusive, but merely suggestive of what is practicable, without any greater interference with the constructed line.

Answer to fourth interrogatory:

What has been done by the Pueblo and Arkansas Valley Railroad Company toward constructing a railroad from the twentieth mile post to Leadville is shown on statement Exhibit "E" of the testimony taken before the examiner.

Answer to fifth interrogatory:

The location of the line so partly constructed is in the valley of the Arkansas River and passes through all of the cañons and defiles thereof, from the twentieth mile post to the head of Brown's Cañon, this being at the end of the seventy-third (73) mile from Cañon City, the road is on the north side of the river. From the head of Brown's Cañon, to a point near what is known as "Shipka Pass," and near the end of the eighty-fifth (85th) mile from Cañon City, at station 4,478, the road is on the south side of the Arkansas River. From station 4,478 to station 4,702, at the commencement of the ninetieth (90th) mile, the road is on the north side of the river.

From station 4,702 on to 5,068, on the ninety-seventh (97th) mile, the road is on the south side of the river.

From station 5,068 to about station 5,415, this being near the mouth of Lake Creek, the road is on the north side of the river.

From station 5,415 to a point near the commencement of the one hundreth and eleventh (111th) mile, the road is on the south side of the river, thence it crosses to the north side of the river and so continues to the mouth of California Gulch and to Leadville.

Answer to sixth interrogatory:

The portions of the line throughout which there is space for another line on the same side of the river, to be constructed at

about the same cost as that of the road that has been built are pointed out and stated in answer to interrogatory three.

Answer to seventh interrogatory:

The value of the line from the twentieth mile post to Leadville, as a whole and in sections and subdivisions, is indicated by the statement of cost of same contained in the testimony taken before the examiner and marked Exhibit "E," errors in accounting if any excepted.

Answer to eighth interrogatory:

The parts of the line so constructed which are on the public domain, and those which are on lands owned by individuals or corporations, are shown on statements "D" of Exhibit "E," of the testimony taken before the examiner.

Answer to ninth interrogatory:

The value of those parts which are on the public domain and those parts which are owned by individuals or corporations, stated separately, as far as they are continuous, is shown on statement of cost of same, contained in the testimony taken before the examiner and marked Exhibit "E," Schedule "D."

All of which is most respectfully submitted.

WILLIAM SOOY SMITH.
GEORGE E. GRAY.
ANDREWS N. ROGERS.

Subscribed and sworn to before me, this 16th day of September, A. D. 1879.

[SEAL.] ARCHIE C. FISK,
Clerk Dist. Court Arapahoe County, Colorado.

DISTRICT AND STATE OF NEBRASKA, } *ss.*
COUNTY OF DOUGLAS. }

Wm. Sooy Smith, being first duly sworn, on oath deposes and says that he is one of the commissioners heretofore appointed by the Circuit Court of the United States for the District of Colorado, to report of and concerning certain matters and things, growing out of a controversy between the Denver and Rio Grande Railway Company and others, touching the right of way for a railroad on the Arkansas River; that the above and foregoing report is truly made according to such appointment, and that the facts, matters, and things therein stated are true and correct, as made and determined by this affiant and his associates, according to the best of his skill and ability. WILLIAM SOOY SMITH.

Subscribed in my presence and sworn to before me, this 26th day of September, 1879.

[SEAL.] WATSON B. SMITH,
Clerk Circuit Court of U. S., District of Nebraska.

DISTRICT AND STATE OF CALIFORNIA, } ss.
CITY AND COUNTY OF SAN FRANCISCO. }

George E. Gray, being first duly sworn, deposes and says that he is one of the commissioners heretofore appointed by the Circuit Court of the United States for the District of Colorado, to report of and concerning certain matters and things growing out of a controversy between the Denver and Rio Grande Railway Company and others, touching the right of way for a railroad on the Arkansas River; that the above and foregoing report is truly made according to such appointment, and that the facts, matters, and things therein stated are true and correct, as made and determined by this affiant and his associates, according to the best of his skill and ability.

GEORGE E. GRAY.

Subscribed and sworn to before me, at San Francisco, in said State of California, this 3d day of October, A. D. 1879.

SOUTHARD HOFFMAN,
[SEAL.] *Clerk U. S. Dist. Court Dist. Cal.*

DISTRICT OF COLORADO, } ss.
COUNTY OF ARAPAHOE. }

Andrews F. Rogers, being first duly sworn, on oath deposes and says that he is one of the commissioners heretofore appointed by the Circuit Court of the United States for the District of Colorado, to report of and concerning certain matters and things growing out of a controversy between the Denver and Rio Grande Railway Company and others, touching the right of way for a railroad on the Arkansas River; that the above and foregoing report is truly made according to such appointment, and that the facts, matters, and things therein stated are true and correct, as made and determined by this affiant and his associates, according to the best of his skill and ability.

ANDREWS N. ROGERS.

Subscribed and sworn to before me, at Denver, in said county and state, this ninth day of October, A. D. 1879.

EDWARD F. BISHOP,
[SEAL.] *Clerk U. S. Circuit Court of the District of Colorado.*

1879

11-711 Field

Jan. 20. 1880

SUPREME COURT OF THE UNITED STATES.

EX PARTE

THE DENVER AND RIO GRANDE RAILWAY COMPANY,

PETITION FOR MANDAMUS.

ARGUMENTS OF MR. SIDNEY BARTLETT AND MR. GEORGE O. SHATTUCK,

January 12 and 13, 1880.

ARGUMENT OF MR. SIDNEY BARTLETT.

MAY it please your Honors: On the day set for the hearing of this cause, there was placed upon your Honors' table a petition for a mandamus to the Circuit Court for Colorado, founded upon the then state of the record. To that petition (waiving the order to show cause) the justices of that court have made a return, and that return places before your Honors a complete record of the facts as they stood at the time this petition for mandamus was filed.

That record shows this state of facts: Upon the filing in the court below of the judgment and mandate of this court, an application was made to the inferior court by the Cañon City Company to be allowed to file certain supplementary or cross-bills. (My friends on the other side do not concur with us in regard to their character, and probably your Honors will hear more or less of a discussion of the distinction between the two. I waive for the present the discussion of that subject.) Those cross or supplemental bills disclose this state of facts, viz.: That pending the appeal in this court, certain negotiations or compromises were had between the parties, by which, for valuable consideration, the Rio Grande Company conceded to the Cañon City Company the right to construct exclusively through the cañon, for the consideration that the Cañon City Company agreed not to build a rival road to Denver from Pueblo, and upon the further consideration that the Cañon City Company would assume all contracts the Rio Grande Company had made to carry on their work in the cañon and would buy their tools.

That is, pending the appeals in this court, the parties got

together and compromised, one party agreeing to abandon any right to construct through the cañon, the other party agreeing not to build a road to Denver. These, with the lease of the road of Rio Grande Company to the Atchison, Topeka and Santa Fé Company, formed the main features of the arrangement.

There was thus raised at the outset the first question of the cause, — whether, after the mandate of this court had been sent down, but before the decree was entered and enrolled, there could be allowed to be filed supplementary bills of the character I have described; that is, bills displaying the proceedings which had occurred subsequent to and pending the appeals to this court, and setting up negotiations between the parties, which if the facts were proved (resting thus far in allegation), would render your Honors' decree and mandate, as sent down, wholly inconsistent with the right or the law of the case. The learned counsel of the Denver and Rio Grande Railroad resisted application to the judges below, to be allowed to file any such supplementary or cross bills.

That question, whether the court below would exercise its discretion to, or could grant the filing of such bills, was argued, and upon that argument the justices of that court declared that they were proper bills to be filed, and ordered them to be filed accordingly. If it were a matter of discretion, that ended it.

The supplementary bills were filed accordingly, and then the counsel of the Rio Grande Company, who declare that they have always been pressing forward to get justice, interposed a demurrer to those supplementary or cross bills. The demurrer was founded upon the exact grounds upon which this contest is conducted (so far as the technical part of the case is concerned) now and in this court. The demurrer undertook to establish two things: First, that by the law of the land, the constitution of this court, and the law

that regulates its practice, after a mandate has been transmitted from this court (though prior to the enrolment of the decree), no supplementary or cross bill can be filed, based upon occurrences or facts, or negotiations and compromises between the parties, while the appeals were pending in this court.

There was a further and technical ground on which the demurrer was rested. The allegation was that if it were true that under the law and rules of procedure of this court, auxiliary proceedings of the character I suggest could be filed before the decree was enrolled, yet that by the principles of equity jurisprudence, the bill in question set up a new title under the compromise, not one enlarging or qualifying the title set out in the original bill.

The court will perceive at once how valuable and important it would have been, if the Rio Grande Company could have maintained this position. For if the facts upon which these supplementary or cross bills were founded were of the character thus asserted, that is to say, negotiations between the parties pending the appeal under which the plaintiff has acquired a new and original title, such title, it may be contended, is not the subject of a supplementary or auxiliary bill, but must be set up in an original bill, which, as it is based on a contract between the parties in no way affected by the constitution or laws of the United States, would not be within the jurisdiction of its courts, and we should be sent to the jurisdiction of the State of which we have had a large and unsatisfactory experience. Your Honors will therefore see upon what ground and with what aim the resistance of the Rio Grande Company was made. The demurrer was overruled.

Then came an application for mandamus from this court, and in this state of the record, viz.: The supplemental bills had been allowed to be filed, and demurrer to the bills argued, and the demurrer overruled. There may have been

other interlocutory proceedings, but those are the only material ones.

The court will see that in that state of the record here, we had but two questions to argue. One of those questions was, as I have already stated, whether by the law that constitutes this court, and by its rules of procedure, or by the general rules of procedure that regulate equity jurisdiction, a supplemental or cross bill could be filed after judgment and mandate of this court, and before its enrolment, such bill being founded on facts occurring pending the appeal in this court. That is a question of equity procedure, and that is one of the questions, therefore, that we came to argue. The additional question, whether, if a supplemental or cross bill could be allowed to be filed, the bills actually fi'ed were founded on a new and original title, acquired after the filing of the original bill, or were bills merely enlarging the title displayed in that original bill, is to be met and will be discussed hereafter. Our views are set out in our original briefs.

If it were true that by the legal principles applicable to equity proceedings, and consistent with the rules which govern this court, a supplemental or cross bill could be filed after a mandate and judgment has been sent down, and before the decree was enrolled, and if that supplemental or cross bill displayed facts which had arisen pending the appeal, and which would render it improper and unjust to go on and execute that judgment and mandate, and were proper subjects of such bills, why, the complaint in the petition for mandamus, that the court below had not gone on to execute the judgment according to the mandate, is an unfounded complaint.

If, on the other hand, my friends were to succeed in maintaining the doctrine that no supplemental bill or no such supplemental bill could be filed, and therefore that we were driven in the latter case to the original bill, then

there is an end of the case so far as this application for a mandamus is concerned.

On Monday morning last, the counsel for the petitioner for the mandamus suggested to your Honors that since the record was made up and returned to this court upon that petition, certain ulterior proceedings had been had in the court below, and that they had terminated in a final decree in that court upon the merits of the whole controversy.

Without undertaking at that time to call the attention of this court to anything more than to what the condition of a case would be when, after the return of a record on a petition for mandamus, upon a suggestion to your Honors that, as there was another record showing subsequent or ulterior proceedings, those ulterior proceedings should be invoked into the cause, the result was that the court directed that a return o, those subsequent proceedings be filed. Such return could not be an auxiliary or amended return of the true record existing when the petition was filed. It did not amend an imperfect return, since it related to a state of things which had occurred after the original return which was required by the petition. But I can conceive (and the suggestion was made from the bench) that, although the record as it stood was complete, yet if, notwithstanding any irregularities in the proceedings of the court below after the judgment and mandate of this court, your Honors should find that a final decree had been rendered in fact (notwithstanding these irregularities) in substantial compliance with the judgment and mandate, I suppose this court would not grant the petition for a mandamus, but deem the case properly disposed of. I cannot conceive that, as an interpretation of the judgment and mandate of this court a year since, the declarations by an inferior court at an ulterior period could have any weight with this court as to its true interpretation or ought to be admitted as such. But I repeat:

that upon the ground that the ultimate decree of the Circuit Court, disposing of this case upon its merits, might convince your Honors, upon perusal of this subsequent record, that substantial compliance had been made in the end with the original mandate of this court it might be admissible, and I concede that in the discretion of this court it may be held so.

I go further: I want to add our cheerful acquiescence in your Honors examining these ultimate proceedings and that ultimate decree, to find if they are or are not repugnant to the principles laid down in its former judgment and mandate, to the end that we may more fully understand the true principles on which this controversy must be determined; and the argument on our part must be framed to meet this view. It will turn upon two propositions: —

First, Were the supplemental or auxiliary bills, by the course of chancery procedure, or the law and practice of this court, capable of being filed at all in this case, after a mandate sent down, and if they were, then was the plaintiff, by reason of the asserted fact that those bills rest upon a new and original title, acquired since the filing of plaintiff's original bill, driven to an original bill, and thus the jurisdiction of these and all United States courts ousted?

Second, Is that portion of the final decree by the court below which directs that the Rio Grande Company shall have the right to enter upon and hold the road built by the Cañon City Company, not only through Royal Gorge, but through and beyond the cañon where two roads may be built, with the further right to priority of location beyond and up to the mouth of the South Arkansas, a substantial compliance with the mandate of this court, or if the mandate does not cover the whole of this territory, can such a decree be consistent with the respective rights of the parties under the act of Congress?

I shall have to discuss both those questions, not merely because they have been learnedly discussed by my brethren on the other side in their briefs, but because I cannot foresee that your Honors will not, in the progress of arriving at a judgment, have to dispose of them.

The road extending through the cañon to the South Arkansas may be divided thus: From Cañon City to the mouth of the cañon is three and one half miles, from the mouth of the Grand Cañon to it its head is 7.65 miles. From the head of the Grand Cañon to the south fork of the Arkansas is forty-eight miles. The decree of the court below, with regard to all but the first portion (which is but trifling), is that the possession of that entire line for fifty odd miles is to be transferred from the parties who have built it, and be placed in the hands of their adversaries (the Rio Grande Company) upon paying compensation. I desire to ask your Honors' careful attention to that proposition, irrespective of the other features of the decree.

The first step in the discussion is to draw your Honors' attention to the precise state of facts which existed, or was supposed to exist, when the cause was before this court, and which was the immediate cause of the original struggle.

Both parties were on the 20th April, 1878, with men and shovels in hand, at the mouth of the Royal Gorge (which part of the cañon is, I think, four miles long, according to the returns of the commissioners). They stood there combating for the enjoyment of a right claimed by both under the act of Congress. This court declares in its judgment, as a front fact established by the evidence, that the four miles of the Royal Gorge was incapable of being occupied by more than one track. (Folio 51.) How this fact turns out, your Honors will see in the sequel.

Now I think it is demonstrable from numerous passages in its judgment, that the mind of this court was almost

wholly directed to one single problem only, and that is, how the enjoyment of that four miles of the Royal Gorge, as between these parties, could be settled; it was substantially limited to that. I think I may state that a study of the record shows that, with a single important exception, to which attention will be called hereafter, there is nothing showing that the mind of the court was directed to the common rights of the parties in the part of the cañon where two roads could be built. Having to settle between these parties as to who should first go through a pass capable of containing only one track, there is, with the exception above referred to, no exposition of the rights of the parties outside of that condition of things.

Your Honors would hardly tolerate my reading each of the detached passages which support this view of its judgment.

Without doing this, I desire to draw the attention of the court to that part of its judgment which may properly be deemed a summary of the principles or rules derived from the facts or reasoning which precede it, and to submit that the same is incapable of any other construction than the one before suggested, namely, that the relative rights of the parties in the Royal Gorge, and not outside of it, was the main point to be settled, and that in the single portion of that judgment which refers to the rights of the parties in that part of the cañon where two roads could be built, each party was to be allowed to proceed with its construction on such lines as it might select.

To justify these positions, we reproduce that portion of the judgment which sums up the conclusion of the court. I find it at folio 70, and it reads as follows: —

"It results from what we have said, that the court below erred in enjoining the Denver Company from proceeding with the construction of its road in the Grand Cañon. The decree, as entered, can only be sustained upon the assump-

tion that the Cañon City Company had by prior occupancy acquired a right *superior* to any which the Denver and Rio Grande Railway Company had to use the cañon for the purpose of constructing its road. But that assumption, we have seen, is not sustained upon the evidence and is inconsistent with the rights given by the Acts of Congress to the Denver Company."

Then follows a clear and complete statement of the rights of the respective parties as they stood at the inception, April 20, 1878, when each was struggling to build in the cañon: —

"The Denver Company should have been allowed to proceed with the construction of its road, unobstructed by the other company. *Where the Grand Cañon is broad enough to enable both companies to proceed without interference with each other in the construction of their respective roads, they should have been allowed to do so.*"

If the judgment had stopped there, the interpretation would not be doubtful as to the rights of the parties in the common easement where two roads could be built. But the next sentence puts beyond doubt the question as to what part of the cañon was subject to the prior right of the Rio Grande Company to occupy for construction, and that it was limited to the Royal Gorge, where the judgment had declared but one road could be built. Let me read it: —

"But in the narrow portion of the defile, *where this course is impracticable, the court, by proper orders, should recognize the prior right of the Denver and Rio Grande Railroad Company.*"

If the prior right of the Rio Grande Company extended throughout the cañon up to the south fork of the Arkansas, although two roads could be built everywhere but in the gorge, why was its priority confined by the judgment to that narrow portion of the defile?

If the purpose was to give to the Rio Grande Company any priority outside the gorge, it would seem impossible that the above limitation should have occurred, and thus our proposition that to the rights of the parties in the Royal Gorge the judgment of the court was substantially confined, is strongly fortified.

But that is not all. Turn to the next page. The court will recollect that it was disclosed upon the motions to dismiss that, under the decree of the court below, the Cañon City Company had proceeded to construct its road in the cañon, but whether beyond the Royal Gorge was not stated, and the judgment of the court next proceeds to declare what in that event should be the disposition of the cause in regard to that construction.

I will read it. It is as follows: —

"It may be that during the pendency of these causes in the court below or since the rendition of the decrees appealed from, the Cañon City Company has, under the authority of the Circuit Court, constructed its road-bed and track in the Grand Cañon or some portion thereof." That is to say, not merely in the Royal Gorge, but as well in the part of the cañon where two roads can be built.

The judgment then proceeds to deal with this contingency in the following manner: —

"In that event the cost thus incurred *in those portions of the cañon which admit of only one road-bed and track* for railroad purposes, may be ascertained and provided for in such manner and upon such terms and conditions as the equities of the parties may require."

There is thus recognized the possibility, that pending the proceedings before and after appeal, the Cañon City Company may have constructed its road, not only through the Royal Gorge but beyond, in that part of the cañon which admits of the construction of two roads without interference,

and that this had been done under a decree of the Circuit Court, but it confines compensation for such structure to the Royal Gorge.

The only ground on which compensation was or could be so restricted must be that the portion built in the gorge was built upon that part of the route in which the Rio Grande Company road, as before declared by the court, had the prior right of occupancy (when one only could occupy), and that although the Rio Grande had thus the right of exclusive occupancy, it ought not to enjoy the fruits of labor and expenditures made under a decree without compensation. But this equity, if the prior right of occupancy by the Rio Grande extended beyond the gorge, attached as well to that portion as to the part within the gorge. The omission, therefore, to provide for such compensation for structure beyond the gorge was the necessary result of the judgment of the court, that "where the Grand Cañon is broad enough to enable both companies to proceed without interference with each other . . . they should be allowed to do so." Having thus proceeded in the broad part of the cañon, they, in doing so, built their own road which, by the judgment, they were entitled to do and are entitled to hold, and, of course, they are not to be compensated for building their own road.

The judgment thus confirms the view we have taken, — that your Honors' attention was substantially confined to the struggle between the parties for the possession of that part of the pass where only one track could be laid.

I have stated, perhaps too strongly, that there is nothing in the judgment of the court which suggests a different view of its purpose and effect. That must be modified. If I had to argue the cause on the other side, I should present to your Honors the view that, by its true construction, it was the purpose of the court to give effect to the preliminary and incomplete surveys made by the Rio Grande Company

in 1871–1872, and to declare that by the entry of the Rio Grande Company on the 19th of April, 1878, in the Royal Gorge, for the purpose of constructing its road therein, these preliminary surveys became effective throughout, and that such entry was more than a mere definitive acceptance of the Act of Congress; and so that by relation, from the moment the Denver Company thus entered upon the gorge, their right of priority, whatever it may be, attached to their preceding action (six years before), and was complete through the whole cañon, and this irrespective of the fact that, except in the Royal Gorge, there was ample room for two roads.

Now I think it is clear those surveys of 1871 and 1872 were so imperfect that this court held them to be wholly ineffectual, even as an acceptance of the Act of Congress; so imperfect that it left Congress the power to have granted to others the right of way in every part of the cañon without regard to these imperfect preliminary surveys. For if Congress might impose a joint occupancy of the narrow part of the cañon with others, it might have taken the whole right of way from the Rio Grande Company. It, cannot therefore, have been intended to apply the doctrine of relation, which attaches only where a location has acquired precision, since such precision is in this case declared by the court not to have existed. Further, under the Act of Congress the court will see that this is a case of a grant of the use in common of a mere right of way. How can priority in the right to occupy in severalty a common easement be acquired by a mere imperfect preliminary survey at all?

I shall assume, therefore, that this court has not declared that by entry at the mouth of the Royal Gorge, on the 28th of April, 1878, there vested in the Rio Grande Company any sort of perfect location throughout the cañon which gave any priority when the imperfections of its preliminary surveys

were such that as against the government it might be reft of its assumed grant by an act of Congress.

Your Honors will perceive that the line of argument which I have desired to pursue is an endeavor to show that there is nothing in the proceedings and decree of the court below repugnant to your Honors' judgment, save that part of it which delivers over to the Rio Grande Company the entire road constructed by the Cañon City Company, and declares that the former has a priority up to the South Arkansas.

With this view, and to this extent only, have I referred to the second record. In another view I shall advert to it again, hereafter.

I have next to suggest to the court that its judgment, as thus construed by us, is in entire conformity to the principles on which courts of equity dispose of the rights of tenants in common, which shall come into controversy.

The authorities are cited in our original brief. Under the Act of Congress, where two or more railway companies propose to avail themselves of the grant, they necessarily, by the provisions of the act, become quasi tenants in common. This is, we think, free from doubt, and that such tenancy in common is of a mere easement or right of way.

The settled doctrine of a court of equity as to tenancies in common we suppose to be this: that although neither tenant can completely dispossess the other, which would at law amount to an ouster, yet if one enters upon a part of the common estate, and erects structures and makes expenditures which improve that part of the estate, a court of equity, when applied to by the other tenant for partition, or other establishment of his rights, never so divides the estates that he shall reap the fruits of the expenditures made by his cotenant. It carefully allows the party who has made the improvements to retain (if it can justly be done,

in a partition) the portion he has improved, and if this cannot be done without compensation, then will his cotenant be accorded compensation, and it is only where justice cannot thus be done that such possession is disturbed.

Such is this case. As applied to the Royal Gorge as held by the court upon the then facts, it is, if it could be held exclusive, a case of usurpation by a tenant in common. As applied to the broad part of the cañon, it is an entry by one tenant in common and an act of exclusive possession of part only of the common property, which does not deprive the other tenants of useful occupancy of the common easement. If such entry and exclusive use gives superior benefits or advantages, the same will by the principles of equity be redressed, not by ouster but by compensation.

Thus far the argument has been confined to a statement of our views of the construction and purpose of the judgment and mandate of this court, and to an attempt to show that the final decree in the Circuit Court is in conflict with that judgment, in that it transfers to the Rio Grande Company the road constructed by the Cañon City Company, and is also in that respect in conflict with the settled principles of equity.

That judgment and mandate proceeded upon a state of facts, declared by it to result from the evidence, that in the Royal Gorge one track only could be laid.

If resort can be had by this court to the record of the further proceedings and decree of the court below, and if the fact above so stated shall be therein, by the report of the companies, found not to exist, but that two roads can conveniently and without interference be built in the gorge, it would seem upon every principle of justice and equity, that the road built by the Cañon City Company, as well in the gorge as in the broad part of the cañon, should be retained by it, making compensation, if it is a case for compensation.

There remain for discussion the questions before stated, viz., Could supplemental or cross bills be lawfully allowed to be filed by the court below, after mandate, but before enrolment? If they could be so allowed, was the frame or character of the bills actually filed such as the rules of equity procedure forbid?

The oral discussion of these questions is omitted, because it would be a mere reproduction of the full argument contained in our original brief.

ARGUMENT OF MR. GEORGE O. SHATTUCK.

May it please your Honors:

Before proceeding to discuss the merits of this case, I desire to say one word as to its limits, and one word as to its equities.

The decree which has been sent here from the Circuit Court of Colorado relates to two cases. The part of the decree which refers to the line between South Arkansas and Leadville has nothing to do with this case. When the preliminary imperfect location was made by the Denver and Rio Grande Company in 1871 in the Grand Cañon, it was made in contemplation of a plan of building a road to the South Arkansas, with a view to going southwesterly into the Gunnison region; Leadville being at that time not thought of. The suit which came here in 1878 on appeal relates only to the part of the line east of South Arkansas. The suit relating to the line beyond is still pending below. I refer to this because the facts which control one case are wholly different from those which apply to the other.

As to the equities of this case, it appears that the Cañon City Company, as I will call it, that being the name that is used in all the reports, has never claimed more than an equal and common right in this cañon, which, as the court below has held, extends the whole length of the line from Cañon City to Leadville. It appears also that, under the different decrees of the court below, there has always, from the beginning, been an opportunity for the Denver Company to go forward and build a line substantially as good as ours and at an equal cost. The commissioners find that the same money that it has cost to build our line to South Arkansas would build another line throughout by its side.

On the other hand the Denver Company claims a monopoly. They say that under the Act of 1872 they had a right to the exclusive use of the cañon as a whole from one point to the other. So that instead of building a road as good as ours, as they might have done, they staked their interest upon an appeal to this court, hoping that by a decision they could secure the exclusive use of this whole line, in the mean time, as they frankly say in their briefs, "consoling themselves" with the hope that the work which we might have done would, to that extent, diminish the time and cost required for their construction.

They come here to-day, after this delay, to assert practically a monopoly, and strive to take the road which we have built under decrees of courts without compensation. I fail to appreciate the indignation which the other side appear to feel at their alleged wrongs, while they are attempting to take advantage of our expenditure of time and money, and make no return.

Mr. Justice Bradley. — Does it appear from the papers before us what the width of the right of way was, and whether there is any difficulty about having a right of way commodiously alongside of that route?

Mr. Shattuck. — The commissioners find that they can build another line the whole distance from the mouth of the Grand Cañon to the South Arkansas at the same expense that we have incurred. Most of the way in the Grand Cañon it will be done by widening our road-bed. The right of way is a matter that I shall consider presently. They could have laid a track by the side of ours, making a double track, without interfering in any way with ours.

Mr. Justice Bradley. — There is the space for two tracks, and not one?

Mr. Shattuck. — Yes, sir. That is found in the report of the commissioners which has been brought here.

Mr. Justice Bradley. — One question more, if you please. Do they claim your road?

Mr. Shattuck. — They do, through the Grand Cañon to

South Arkansas without compensation. They say that under the mandate of this court they ought to have been restored to the possession of their right of way, and ought to have taken our road without compensation.

Mr. JUSTICE BRADLEY. — I suppose they claim that your road, in portions of the distance at least, lies on their previous surveys?

Mr. SHATTUCK. — Yes, sir; that is their claim, — that it lies on their alleged right of way.

Mr. JUSTICE BRADLEY. — And it is on those portions where they claim your road, and only those?

Mr. SHATTUCK. — That is substantially so. But one word more as to our position. Claiming, as I have said, only an equal right, we have gone on from the beginning in obedience to a public call, and of course for our own interest, and built the road. Before the time when the opinion of this court was announced, we had built through the whole of the Grand Cañon under the decree of the court below, and since that time we have built a part of the line between the Grand Cañon and the south fork of the Arkansas. As in that part; the commissioners find that two roads could be built at the same time without interference with each other, we had a right to go on under the mandate of this court.

The law in this case is contained in the mandate, and it is practically a question of the construction of the mandate. And as the whole opinion is incorporated in the mandate, it becomes a question of the construction of that opinion.

As that opinion authorized supplemental proceedings, the court below properly allowed them. A question has been raised as to the form of those proceedings, but it is clear that this court will not consider that question upon an application for a mandamus. If a supplemental bill or cross-bill or answer has been properly filed, it follows, of course, that the court below was not bound, before a hearing upon the new matter, to enter the decrees of this court; and this petition ought to fail for that reason.

But we desire a construction of this opinion upon the

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But we desire a construction of this opinion upon the

merits of the case because different interpretations have been put upon it. And it is not only with reference to this cañon, but with reference to the numerous cañons existing in New Mexico and Colorado, in which we are or may be interested, that we desire that a proper construction be placed upon it.

We contend that the final decree of the court below is erroneous in taking away our road between the mouth of the Grand Cañon and South Arkansas upon any terms.

I shall consider first the principles of equity applicable to a case like this, and ask to have this opinion construed in the light of those principles.

The Act of Congress of March 3, 1875, provides that any railroad company may use a cañon "*in common with the road first located*," — not pick out a route in the cañon after the location of the first road, but may use the cañon and the whole cañon in common. And this court, in the opinion which is a part of its mandate, declared that the purpose of that Act was to give all railroad companies "equal and common rights" in cañons.

If the legal title to the easement in the cañon is in common, then any improvements made are common in law, but subject to the control of a court of equity, which may direct the use of them upon equitable terms, having reference to the money invested in the improvement by one tenant in common or the other. It is common property, and therefore, as matter of law, it was wholly immaterial after the work was done which one of the tenants in common had built through the narrow part of the gorge where it was supposed that only one road could be built. And after it was built it was common property and the title could not be changed; the only question was as to the equitable apportionment of the cost and the use.

This is not a question of the transfer of title. The title to the property placed there is common, subject to the jurisdiction of a court of equity to work out the equities by

seeing that the party expending any money upon it which inures to the common benefit is properly compensated by the other.

Mr. JUSTICE MILLER. — As long as I have been in this case or have had anything to do with it, that idea advanced by you is new to me. I would like you to read the opinion or the statute which makes this a tenancy in common.

Mr. SHATTUCK. — I think that necessarily follows, and if your Honor will allow me to pursue the investigation a little further, I think I can make it plain. I will read the Act of Congress of March 3, 1875: —

"That any railroad company whose *right of way*, or whose track or road-bed upon such right of way, passes through any cañon, pass, or defile, shall not prevent any other railroad company from the use and occupancy of said cañon, pass or defile, for the purposes of its road *in common* with the road first located."

Mr. JUSTICE BRADLEY. — Might not that be construed as not a technical tenancy in common, but that both may build their roads through cañons equally?

Mr. SHATTUCK. — That is so. That construction might answer while there is room for all the roads which parties desire to build. But let us go one step further. These two roads will practically occupy the whole of this cañon with their tracks. Suppose a third railroad company comes. How will you dispose of that, if one road has exclusive right to its location? Regarding these parties as tenants in common of an easement, it gives an easy solution to this whole question. But if either owns this track in severalty, how can its title be disturbed?

Where language having a recognized meaning is used in a statute, upon any sound principle the language must receive its recognized interpretation, and the court, in dealing with this great problem, must be guided by the principles established by courts of equity in similar cases. If that is done, the interpretation of this opinion is substantially clear, and the solution of this whole problem, under the guidance of

those principles, easy and simple. A departure from this rule can be justified only by necessity.

There is no other ground on which the declarations of this court can be harmonized, and which can explain the part of the opinion of the court below, which was adopted by this court.

In the next place, a location by metes and bounds on a common right does not give an exclusive claim within those limits. That principle was recognized by Judge Dillon, who was upon the bench of the Circuit Court when this case came up. Both companies had located their roads on the same side of the river and of the cañon, but Judge Dillon said, "If a centre line can be drawn through the cañon, one company should be restricted to the space on one side of the line and the other to the space on the other side of the line, if this will allow of the construction of the two lines of railway in the cañon, and no other course is more equitable." This was very clearly inconsistent with any theory that a definite location gave any exclusive rights within its boundaries, or that there was anything more than a right in common which was to be worked out by a court upon equitable principles.

But if that was not a satisfactory solution of the problem, it was suggested by him that each party could proceed, subject to the control of a court of equity, and that the party first occupying should be reqired to leave an "*equal, fair, and reasonable route*" for the other party. The *right of selection* was denied *in toto*, both in the opinion and decree below, and the rights were recognized simply as common, the equities to be worked out under the direction of the court.

Another result follows from this principle, and it was clearly indicated by this court. If the rights are equal and common, the only priority is the priority in building or constructing.

There is no prior right beyond this, and the language of this court was carefully guarded. *There was no recognition of any prior "right of way" or prior right "to select" or prior*

right to "locate." These words were not used. It was simply a prior right to construct a track. The court below said, Where there is not room enough for two parties, one party can go forward, although both parties have an equal right to do so, but the party occupying first shall leave a line equally valuable for the other. That is all that the words "prior" can mean, when applied to common rights. The word "prior," as applied to a right, may mean that it was first in its origin, or may be exercised first. It may be an inferior right; it may be more or less valuable, or it may be equal. This court said in substance that although there is a prior right to construct in the narrow part of the cañon, "*after completion*" the right is common. (99 U. S. 481.)

The clause is this: "Further, if in any portion of the Grand Cañon it is impracticable or impossible to lay down more than one road-bed and track, the court, while recognizing the *prior right of the Denver Company to construct and operate that* track for its own business, should, by proper orders, and upon such terms as may be just and equitable, establish and secure the rights of the Cañon City Company, conferred by the Act of March 3, 1875, to use the same road-bed and track, *after completion, in common* with the Denver Company." This refers only to the narrow part of the cañon. But by the Act of Congress, the common right must extend to all parts of the cañon. One mode of enjoyment may be proper in the narrow parts, and another in the broad parts.

If this is a common right, it also follows that a court of equity will not deprive a party of the use of improvements which he has made, even with compensation, unless to prevent an utter failure of justice. That is an established rule of equity which this court will follow. I refer to the authorities cited upon our original brief.

Upon this principle the court may admit the other party to participate in the equal and common use of this road, thus built by the Cañon City Company or may require the Denver Company to construct another track, but cannot exclude us from the use of work we have done.

I have thus stated the principles of law and equity, which we submit ought to control in the construction of this mandate.

I now come to the second part of the argument, and consider its construction with reference to the exact question at issue, — the controversy as it was understood by this court at the time when the mandate was issued. The only substantial question here is as to the nature and extent of the "prior right" of construction, which the mandate required the court below to recognize.

The Denver Company contends and the court below in entering the decree has said, that the prior right of construction gives them a "*prior right of way to select a location.*" Now, the right to select a location is, as they have stated in their brief, a right of enormous value.

They may select through the middle of the cañon and deprive us of all advantages. It may be practically a monopoly. There is not only no sanction for that in the opinion and mandate of this court, but, as I shall presently show, it is distinctly denied.

What was the prior right? It was not defined in the opinion of this court, because it was not necessary. It has been practically defined in the opinion and decree of the court below. In the statement of facts in the case 99 U. S. 469, it is said: —

"In the suit instituted by the Cañon City Company, the Denver Company filed a cross-bill, setting up substantially the same facts as in its original bill against Alling and others, and a decree was rendered which, among other things, *recognized the prior right of the former to proceed in the construction and operation* of its road through the Grand Cañon, without interference or obstruction in any way by the Denver Company, but with liberty to the latter to exhibit its bill in any court of competent jurisdiction to compel the Cañon City Company *to so change, locate and construct its road as to permit the convenient and proper location* by the Denver Company of its own road, or to compel the Cañon City Com-

pany to permit the Denver Company *to occupy the track and roadway of the former company*, if at any point in that defile it should be impracticable to conveniently lay down or safely operate two distinct lines of railway."

This court decided that the prior right ought to have been recognized in the Denver Company instead of the Cañon City Company, and they speak of it simply as *the* prior right, clearly meaning to adopt the definition given in the court below.

It follows that the only difference between the mandate of this court and the decision of the court below was that "the prior right" which had been recognized should be transferred from one company to the other. It is therefore important to look at the decree of the court below, which was before this court, and the opinion of the Circuit Court given by Mr. Justice Dillon in order to determine what was meant by "prior right."

In the first place, was it a right to a definite, fixed location? Clearly it was not. It was first suggested, as shown in the quotation from the opinion of Dillon, J., already made, that the cañon should be divided, and one road be placed upon one side, and the other upon the other, although both had located on the same side; but afterwards it was determined to let one party go forward, subject to the limitation that an equally good line, or convenient and proper line should be left to the other party. It was admitted that both had acquired a right in the cañon under the Act of March 3, 1875.

Dillon, J. said, "We have the case of a *concurrent* right in two companies to construct their roads through the cañon, and to use and occupy the cañon for that purpose. . . . If a centre line can be drawn through the cañon, one company should be restricted to the space on one side of the line, and the other to the space on the other side of the line, if this will allow of the construction of the two lines of railway in the cañon, and no other course is more equitable.

Mr. Justice Miller. — That was reversed.

Mr. SHATTUCK. — It was reversed on a single ground, — that the prior right recognized in the Cañon City Company should have been recognized in the Denver Company. This court used the same words with reference to the Denver Company that the court below had used with reference to the Cañon City Company. It was simply a transfer from one corporation to the other; it was not a modification of the prior right, — there was no suggestion of a modification in it.

Then the court below said, after the words quoted above, As both parties cannot go on with the construction at the same time, one of them which has the "*prior right of occupation*," shall go forward, but shall leave "an equal, fair and reasonable" use of the cañon for the other. "Equality is equity." They were allowed to go forward and work out their equal rights under the control of the court of equity.

Did the prior right include a right of selecting a location?

This court, as I have already shown, in reporting the proceedings of the court below, say that that court recognized the prior right of the Cañon City Company to proceed in the construction; and they use identically that language when they speak subsequently of the prior right of the Denver Company, thereby adopting the opinion of the court below without modification as to the nature of the "prior right."

Let us examine the decree of the court below to see if there was any right of selection recognized there. It is clear that there was not. The court say that the Cañon City Company may go forward in a certain line, but the other company may at any time apply to the court and compel them to adhere to that line, or it may apply to the court to compel them to change that line, if it does not leave them a "convenient and proper line."

So that every rail that has been laid down by the Cañon City Company under the decree was laid down either with the consent of the Denver Company, because it left them a "convenient and proper line," or if not it was because the

Denver Company failed to apply to a court of equity to secure for themselves such convenient and proper line. But there was no right of selection, no suggestion of the absolute right of selection. On the contrary, it is distinctly denied.

Such a right of selection as is assumed by Judge Hallett in the final decree would be exclusive, and could not be recognized without a substantial violation of the statute which says that those rights shall be in common.

Therefore it appears that when this court declared the prior right to be transferred from the one company to the other, it simply recognized the prior right which the court below had adopted.

Mr. JUSTICE MILLER. — Will you please tell me the value of that prior right, as far as you have defined it? Does it simply mean the right to spend money?

Mr. SHATTUCK. — The priority was not of much value, and perhaps I may say, ought not to be of any value, because the Act of Congress says the use shall be "common" and the opinion of this court says the use shall be "*equal* and common."

Mr. JUSTICE MILLER. — Do you mean that the second road is just to go right on as soon as it is built, without paying anything?

Mr. SHATTUCK. — Oh, no.

Mr. JUSTICE MILLER. — Do tell me what you do mean. There must be something more than the mere right to build a road at their own expense, and the other party use it.

Mr. SHATTUCK. — The party having the prior right may go forward and select a line, provided they leave for the other party a convenient and proper location. For instance, if there is a cañon thirty feet wide, they have no right of selection which will enable them to build a road in the middle of that thirty feet and make it impracticable to build another road. If they attempt it, the other party has a right to ask the court to restrain them from that occupation and compel them to leave a fair and reasonable use of the cañon to them. The rights are common and the prior right only exists by necessity because two cannot do the same thing at the same time

and in the same place. But it must be reduced to the smallest practicable value, so as not to be inconsistent with the equal and common right. One company cannot use the track of another without compensation, and when there is room conveniently to build another track, may not be allowed to use it at all.

Mr. JUSTICE MILLER. — This priority of right, as I remember the opinion, is founded upon the Act of 1872. That right, therefore, existed long before your company had an existence. Did your coming into existence limit their right to choose and select?

Mr. SHATTUCK. — The court held that their rights under the Act of 1872, as they received an extension of their charter after the passage of the Act of 1875, were subject to the latter Act, so that when they came there, they were subject to the Act of 1875, which made all rights in cañons equal and common. If they had gone forward and built before we had acquired any common right, that would have presented another question. But on the 19th of April, 1878, the court below, and this court also, found that both corporations had equal and common rights in that cañon, and both were ready to go forward at the same time. I will read from the opinion of this court: —

"When, therefore, it accepted the benefits of the Act of March 3, 1877, it must be held to have assented to the provisions of the Act of March 3, 1875, whereby it was declared in the interest of the public that any other railroad company, duly organized under the laws of any State or Territory, might use and occupy the cañon for the purpose of its road in common with the road first located. At the time of the passage of the Act of March 3, 1875, Congress had become convinced of the importance to the country, and particularly to the Western States, of preserving cañons, passes and defiles in the public domain *for the equal and common use of* all railroad companies organized under competent State or Territorial authority, and to which might be granted by national authority the right of way."

At the time this controversy arose, we had located under the Act of 1875, and they had located under their charter, neither company having proceeded to exercise their common right; the court said, under those circumstances it must be worked out equally as far as possible.

Mr. Justice Miller. — What did we mean by that?

Mr. Shattuck. — As interpreted by the court below and this court, it meant simply that as both had equal rights to build in that cañon, and only one could build at a time, the party should be allowed to go forward and build first, who had first appropriated the cañon. That is exactly what the court below did, and what this court called recognizing a prior right. There was no suggestion that the Act of 1872 gave any prior right. On the examination of the opinions of both the judges below, the prior right of one party to go forward at a time and construct is recognized. They carefully avoid the use of any stronger words than "prior right to construct," and the moment they did construct, the right was to be common at law, but under the control of a court of equity, which would see that the cost of construction should be provided for, and the use regulated upon reasonable terms. And the opinion of this court is to the same effect. In folio 72 of the opinion it says: —

"While recognizing the *prior right* of the Denver Company *to construct and operate* that track for its own business, [the court] should, by proper orders and upon such terms as may be just and equitable, establish and secure the right of the Cañon City Company conferred by the Act of March 3, 1875, to use the same road-bed and track *after completion, in common* with the Denver Company."

Now, a common right implies equal right, and the court said, therefore, in substance, that while this process of construction is going on, you are to have a prior right in the narrow part of the cañon, and afterwards it is to be a common or equal right. I do not see how any other construction can be put upon the opinion of the court.

I now desire to read a few extracts from this opinion and

consider their construction in detail. The court had declared that the rights in this cañon, under the statute of 1875, were equal and common, and the only priority declared in the decree of the court below was that where there was not room for two companies to go forward at the same time, one should go forward first; simply from the necessity of the case, and for no other reason. No other reason has been suggested for giving a prior right, in any of the opinions of the courts, that I know of. The Cañon City Company was selected to go forward in the court below because the court found that it had appropriated the cañon first.

Mr. Justice Miller. — Probably it was becau-e it was very well known that that company had the money to build it.

Mr. Shattuck. — I was not there at the time, and can only know from the record. I can only judge from the statements in the opinions of the court below, which formed a part of the record here in this case. Both of the judges in the court below stated that the right of one to proceed first was given simply *because there was not room for two to go forward at the same time*, and therefore the first comer should be allowed to go forward; and that is the only reason given in any of the opinions or judgments for it. I have already quoted the opinion of Judge Dillon to the same effect.

Judge Hallett said they may both go forward on the common right of way. The location does not preclude that. Then he adds: —

"It is only necessary to say that both companies cannot go on with the work of construction at the same time in a narrow defile, such as this."

But this view is sustained in the opinion of this court. It said, "Where the Grand Cañon is broad enough to enable both companies to proceed without interference with each other in the construction of their respective roads, they should be allowed to do so."

There was to be no priority where there was room for two,

because the necessity for it did not exist. We went forward on the faith of that declaration, which is a part of the mandate, and forty miles have been constructed. Can we be deprived of it? What is there in the mandate anywhere, which controls that clause?

This court, at the time of the argument, supposed that there were two divisions of the cañon which were important. In the first division, where there was room enough for both roads to build without interfering with each other, the court provided, in the language just quoted, that they should both go on. If they did not agree, the court might interfere, but there was to be no priority. That is part of the mandate, and that is substantially a declaration that we can hold that road.

The next division of the cañon was that in which it was supposed that there was room for two roads, but two could not be built at the same time, and with reference to that the court say : —

"But in the narrow portions of the defile, where this course is impracticable, the court, by proper orders, should recognize the prior right of the Denver and Rio Grande Railway Company to construct its road."

What is meant by that prior right to construct? It is to be construed with reference to the whole opinion. One statement of the opinion is that the rights in the cañon are equal and common, and that construction of the prior right must be consistent, if possible, with that equal and common right, and it must be of as little value as possible. Any priority can only exist from necessity. "*After completion*," the use, this court says, is to be common. It means, as we contend, merely a right of one to go forward and do work which two have a right to do, where there is room for one only to work at the same time.

But if you make the prior right greater, you make it exclusive in its nature, and it substantially defeats the Act of Congress and secures for the Rio Grande Company the exclusive right in other cañons if not in this, which they

asked for when they came here in 1878, and which this court refused to recognize. The right was to be prior while they were constructing, in common after completion.

The next sentence, upon which the Denver Company relies as an important part of this opinion, is as follows: —

"The decrees in these causes are therefore reversed, with directions to set aside the order granting an injunction against the Denver and Rio Grande Railway Company, and also the order dissolving the injunction granted in its favor and dismissing its bill."

If these two orders are not to be interpreted with reference to the next sentence, they would simply restore an injunction against us which prohibited our going through the Grand Cañon at all. That sentence is to be construed with the next: —

"By proper orders entered in each suit, the court below will recognize the prior right of that company [the Denver] to occupy and use the Grand Cañon for the purpose of constructing its road therein."

What then, fairly, was the meaning of these sentences? It was that they should dismiss those bills, modify those injunctions, enter proper orders recognizing the prior right of one of these companies, not to select, not to locate, but to go forward on the route to be approved by the court, leaving a reasonable and just location for the other road, and giving a just opportunity to build.

There is another significant clause here. If the views contended for by the counsel on the other side are correct, they had a prior right to select, and if this decree is entered in the form they desire, they have a right to select and go forward and build as they please. We should have no rights left, practically, which they would be bound to respect while they were constructing their road. Our road is all built. They may take it from us and pay us nothing.

But the court did not intend that. By the mandate *both suits* are to be kept alive, ours for our protection, so that both could go forward as was contemplated by the court,

and work out the equities. Otherwise there is no motive for keeping alive our suit.

There is one other suggestion. It is plain that our road cannot be taken from us, unless there is something in this mandate which directs that it should be taken from us, directly or by implication. Now, as it was known by this court that we had been building our road in the broad parts of this cañon, it is most extraordinary, if it was in the mind of the court that we were to be deprived of what we had built, that it was not stated, and in terms. A right to take property, even when paying its value, is not one of those rights which is to be construed violently into a decree or a mandate. It must be found there distinctly.

This case is of great importance. It came here with a claim on the part of the Denver Company of exclusive property to almost every cañon in Colorado and New Mexico. This court said it was not an exclusive right, but that it was simply under the circumstances — they having come in as they did — an equal and common right; that as they had come in first, they had the prior right to go forward when there was not room for both at once.

But this could not apply to parts of the cañon where either party had gone forward, and the decree excluding the Cañon City Company from the road which it has built, on any terms, is in conflict with the mandate of this court, and we ask this court to so declare.

The rule the court below seems to have adopted in the final decree, of giving one company the absolute right to select by metes and bounds, and to go forward, is rigid, and prevents any equitable adjustment of the relations of different roads.

But if they are dealt with as tenants in common, according to the principles which have been stated, there is no want of flexibility.

As the court below has applied these principles in the final decree, we having partially built a road of one hundred and thirteen or one hundred and fourteen miles in length, are left

with half of it forty miles from any base, so that the two parts cannot be improved for the common advantage.

If this had been dealt with as a right in common in that whole cañon extending from Cañon City to Leadville, the court could easily have adjusted the equities between the parties by permitting a common use of the single track or otherwise in such a way that the public could have had the benefit of the whole improvement. Now it is impossible. One had a prior appropriation of one part, and the other had a prior appropriation of the other part. But we ask this court to correct the error.

Only one word more. The contention here, on the part of the plaintiffs, is that they are to take this property without compensation.

It seems to me that it is contrary to all the principles which have been laid down with reference to the enjoyment of common rights by courts of equity to allow them to disturb us in possession at all. But there is no case where money expended in good faith under the decree of a court of equity can be taken without compensation. This principle will apply, whatever view may be taken of the common right. We are entitled to the full value, and not the cost, which is much less than the present value.